Supreme Court, U.S.
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No. 101035

In the Supreme Court of the United States

Kevin Loye, Gina Gist, Vikki Marshall, David Stiles,

Petitioners,

v.

County of Dakota,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The regulations implementing Title II of the Americans with Disabilities Act (ADA) and the Federal Rehabilitation Act require a public entity to take steps to ensure that communications with people with disabilities are as effective as communications with others and to furnish appropriate auxiliary aids and services to afford persons with disabilities an equal opportunity to participate in, and enjoy the benefits of, its services, programs, and activities.

The questions presented are:

1. Are the regulations implementing Title II of the ADA and the Rehabilitation Act entitled to substantial deference under *Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) in a federal disability discrimination claim against a public entity which failed to provide interpreter services for communications with deaf people?

2. If so, when such regulations are applied to the facts of record pursuant to the summary judgment standard, are Petitioners, who are deaf, entitled to reinstatement of their claims because they were not able to participate equally in a service, program, or activity of a public entity and they were unable to communicate as effectively with that entity as others were able to communicate?

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, A-1) is reported at 625 F.3d 494. The opinion of the district court (App., *infra*, A-15) is reported at 647 F. Supp. 2d 1081.[1]

JURSIDICTION

The court of appeals' judgment was entered on November 17, 2010. App., *infra*, A-14. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant portions of the Americans with Disabilities Act (Title II), 42 U.S.C. §§ 12132 and 12134(b), are reproduced at App., *infra* A-43. The relevant portion of the Department of Justice regulations implementing Title II of the Americans with Disabilities Act, 28 C.F.R. § 35.160, is reproduced at App., *infra* A-45.

The relevant portions of the Federal Rehabilitation Act, 29 U.S.C. § 794, are reproduced at App., *infra* A-46. The relevant portion of the Department of Justice regulations implementing the

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[1] The district court issued an order on September 8, 2009, correcting a portion of its order granting summary judgment which involved discovery sanctions against Plaintiff David Stiles. The court did not issue an amended order.

Federal Rehabilitation Act, 28 C.F.R. § 39.160, is reproduced at App., *infra* A-47.

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U.S. Department of Justice, *ADA Best Practices Tool Kit for State and Local Governments, Chapter 7, Emergency Management Under Title II of the ADA,* http://www.ada.gov/pcatoolkit/chap7emergencymgmt.pdf at p. 7 8

STATEMENT

This case raises important, recurring questions concerning the standard public entities must meet to comply with Title II of the Americans with Disabilities Act (ADA) and the Federal Rehabilitation Act (Rehabilitation Act), and the deference courts should give to regulations the U.S. Department of Justice issued to implement those statutes. It also calls into question the obligations of public entities under Title II of the ADA and the Rehabilitation Act to provide American Sign Language (ASL) interpreters to ensure effective communication with deaf people. The Eighth Circuit failed to defer to the regulations and apply the standards they contain for compliance with the statutes, as required by *Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) when it affirmed the decision of the district court granting Respondent's motion for summary judgment. If the Eighth Circuit had properly applied the standards in the regulations which require Respondent to ensure effective communication with deaf persons and to allow deaf persons equal participation in its services, it would have reversed the District Court's decision granting summary judgment to Respondent.

The decision of the Eighth Circuit in this case is in conflict with the decisions of five other courts of appeal which have granted substantial deference to the regulations implementing ADA Title II and the Rehabilitation Act pursuant to *Chevron*. The remaining circuits have not yet decided if the

regulations are entitled to deference. Their decisions may be negatively influenced by the conflict created by the Eighth Circuit's failure to give proper deference to the regulations.

This Court has not yet determined whether the ADA Title II regulations are valid and entitled to *Chevron* deference. *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 591-92 (1999). This case provides the Court with the opportunity to resolve the conflict in the courts of appeal and make clear that the ADA Title II regulations are valid and entitled to substantial deference. This Court can clearly state that the regulations set the standard for compliance with the requirements of the laws pertaining to accessible communication for deaf individuals, as well as the standards for determining liability under the statutes.[2]

A. Background

In 2004 a mercury spill occurred in Rosemount, Minnesota. Petitioners are four deaf individuals who were exposed to the mercury. Their primary language is ASL. They have limited ability to use and understand English without an interpreter.

In the weeks following the spill, Respondent provided emergency assistance services to everyone who had been contaminated. These services

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[2] Petitioners do not seek review of the Eighth Circuit's decision affirming summary judgment on the claims related to communication at the decontamination tent.

included a series of large group informational meetings for all of the families who were contaminated, including the Petitioners. These periodic meetings were a forum for presenting ongoing status information about the recovery process, and an opportunity for the families to ask questions and voice their concerns. The Respondent also provided assistance and recovery services to all effected families through its Public Health Department. Respondent's Public Health nurses met separately with each family that had been exposed to mercury to provide assistance while their homes were being decontaminated.[3]

Respondent failed to provide ASL interpreters for communication between its staff and Petitioners in connection with these relief services, even though Petitioners made multiple requests for interpreters. There was no ASL interpreter who interpreted several of the large group informational meetings. In addition, there was no ASL interpreter for most of the meetings between the Public Health nurse and Petitioners.[4] Because there was no interpreter,

[3] The service provided by Respondent's Public Health nurses was not an accommodation to Petitioners. The service was provided to all of the families that had been exposed to mercury, deaf and hearing alike. The Eighth Circuit's conclusion that this service was an accommodation for deaf families (App. A-13) is not correct. Respondent did not contend that the Public Health nurse services were provided only to deaf people and there is no evidence in the record that this was an accommodation provided to deaf people.

[4] On several occasions, the Public Health nurse chose to communicate with Petitioner Marshall's fiancé, who is not an interpreter and has very limited ASL skills, instead of communicating directly with Marshall. The fiancé did not

Petitioners were not able to fully participate in or benefit from these services.

The Petitioners filed suit alleging Respondent violated the ADA and the Rehabilitation Act by not providing ASL interpreters to ensure effective communication during the assistance services it provided after the mercury spill.

B. The Regulatory Structure of the ADA and Rehabilitation Act

The two federal statutes, and the regulations adopted to implement them, create integrated and clear standards that public entities must follow to remove barriers to communication with deaf persons and allow deaf persons to fully participate in their services.

In 1973, Congress adopted the Rehabilitation Act, which required public entities receiving federal funding to take affirmative steps to ensure that people with disabilities receive equal access to and benefit from their programs and services. 29 U.S.C. § 794 (App. A-46). Seventeen years later, Congress adopted the Americans with Disabilities Act, which extended the requirements of the Rehabilitation Act to all public entities. Congress specifically found that people with disabilities "continually encounter various forms of discrimination, including the discriminatory effects of . . . communication barriers." 42 U.S.C. § 12101(a)(5). It also found that

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communicate to Marshall much of what the nurse said, and he did not interpret what Marshall wanted to say to the nurse.

the Nation's goals regarding people with disabilities include assuring their "full participation" in society. 42 U.S.C. § 12101(a)(8).

Title II of the ADA addresses the obligations of public entities towards individuals with disabilities. It states the general rule that public entities must not deny the benefits of their programs and services to people with disabilities and prohibits public entities from discriminating on the basis of disability. 42 U.S.C. § 12132 (App. A-43). Congress delegated responsibility to the Attorney General to develop and implement regulations that define the obligations of public entities with more specificity. 42 U.S.C. § 12134 (App. A-43).

Because Congress understood the importance of removing communication barriers that limit the ability of deaf people to fully participate in public services, it explicitly directed the Attorney General to develop regulations that address communication access. 42 U.S.C. § 12134(b) (App. A-43). It required that ADA regulations concerning communication access must be consistent with those implementing the Rehabilitation Act. 42 U.S.C. § 12134(b) (App. A-43).

The regulations implementing the Rehabilitation Act explicitly require that government agencies "take appropriate steps to ensure effective communication . . . ." 28 C.F.R. § 39.160(a) (App. A-47). They require public entities to "furnish appropriate auxiliary aids where necessary to afford a handicapped person an equal

opportunity to participate in, and enjoy the benefits of a program or activity conducted by the agency." 28 C.F.R. § 39.160(a)(1) (App. A-47) (emphasis added). *See also:* 28 C.F.R. § 39.103 (definition of auxiliary aids).

Congress's direction that the ADA Title II regulations must be consistent with the regulations implementing the Rehabilitation Act demonstrates that Congress knew of, and approved of, the Rehabilitation Act regulations requiring public entities to provide interpreters and other auxiliary aids that will ensure effective communications.

Following the passage of the ADA, the Department of Justice adopted regulations to implement Title II of the law. 28 C.F.R. pt. 35. As Congress directed, the Title II regulations explicitly address the obligations of public entities to provide accessible communication and require them to take action to ensure effective communication. 28 C.F.R. § 35.160 (App. A-45). They require that public entities:

- "Take appropriate steps to ensure that communications with applicants, participants and members of the public with disabilities are as effective as communications with others." 28 C.F.R. § 35.160(a) (App. A-45);

- "furnish appropriate auxiliary aids and services where necessary to afford an individual with a disability an equal opportunity to participate in, and enjoy the

benefits of, a service, program or activity . . . ." 28 C.F.R. § 35.160(a) (App. A-45) (emphasis added);

- "give primary consideration to the deaf person's choice of auxiliary aid." 28 C.F.R. § 35.160(b)(2) (App. A-45).

The regulations define effective communication as "communication that is as effective as communication with others." 28 C.F.R. § 35.160 (App. A-45).

The Department of Justice complied with Congress's directions. The regulations implementing Title II of the ADA as it applies to communication access are consistent with, and almost identical to, the regulations concerning communication which were adopted to implement the Rehabilitation Act. (*Compare* 28 U.S.C. § 39.160.)

The Executive Branch has also issued specific directions to public agencies emphasizing the importance of ensuring effective communication with deaf people in order to provide full and effective access to disaster assistance services. The emergency responses to the 9/11 attacks, Hurricane Katrina, and other recent disasters demonstrated that people with disabilities face significant risks and challenges during emergency response operations, and prompted the federal government to adopt policies to adequately address their communication needs during emergency relief and assistance efforts. *See*, Executive Order #13347, 69 Fed. Reg. 44,573 (July 22, 2004). Other

federal agencies, including the U.S. Department of Homeland Security and the Department of Justice have also published guidance and directions to assist public entities in meeting their obligations to ensure effective communication with deaf individuals in connection with their emergency response and relief services. *See*, for example:

- U.S. Department of Homeland Security: *Letter from Department of Homeland Security Secretary Ridge to State and Territorial Governors (1/3/05),* http://www.dhs.gov/xlibrary/assets/CRCL_IWDEP_AnnualReport_2005.pdf at 43*; Department of U.S. Homeland Security Nationwide Plan Review: Phase 2 Report issued June 16, 2006, "Emergency Responders and the Deaf and Hard of Hearing Community: Taking the First Steps to Disaster Preparedness,"* http://www.dhs.gov/xlibrary/assets/Prep_NationwidePlanReview.pdf at 42-4;

- U.S. Department of Justice: *An ADA Guide for Local Governments: Making Community Emergency Preparedness and Response Programs Accessible to People with Disabilities*, http://www.ada.gov/emergpreguideprt.pdf at p. 9; *"Model Policy for Law Enforcement on Communicating with People who are Deaf or Hard of Hearing,"* http://www.ada.gov/lawenfmodpolicy.pdf. at p. 9*; ADA Best Practices Tool Kit for State and Local Governments, Chapter 7, Emergency*

Management Under Title II of the ADA, http://www.ada.gov/pcatoolkit/chap7emergencymgmt.pdf at p. 7.

C. The District Court's Decision

Petitioners filed suit alleging that Respondent failed to meet its obligations under federal law to ensure that they could participate equally in, and fully benefit from, its disaster relief services. Petitioners specifically alleged that effective communication did not take place without an interpreter during these services. As a result, Petitioners were treated differently and were not able to fully and equally participate in them.

Respondent moved for summary judgment. Petitioners opposed the motion, arguing that the ADA Title II regulations concerning communication (28 C.F.R. § 35.160) set the standard for liability. They produced evidence showing that Respondent failed to comply with the requirements of the regulations, including evidence showing:

- Many of the large group meetings were not interpreted for them;
- There was no interpreter for most of their meetings with Respondent's Public Health nurse; and
- When there was no interpreter, they could not understand what was said at the meetings, adequately express their thoughts and

questions, and they could not fully participate in the meetings.

In addition, Petitioners presented unrebutted evidence from expert witnesses that Petitioners have limited English language skills and could not equally participate in the meetings when there was no interpreter. The district court nevertheless granted Respondent's motion for summary judgment. App. A-15.

D. The Court of Appeals' Decision

The Eighth Circuit Court of Appeals affirmed the decision of the district court, rejecting Petitioners' arguments that the regulations implementing ADA Title II set the standard for liability under the federal laws and that Respondent was required to ensure effective communication with Petitioners. The Eighth Circuit explicitly rejected the requirement of the Title II regulations that "effective communication" means communication that is as effective as communication with others (hearing people). App. A-9. Instead, the Eighth Circuit applied a lesser standard for liability that did not consider Petitioners' ability to participate in Respondent's service, or their ability to effectively communicate with Respondent. App. A-4 and A-10. The court ruled Petitioners' evidence that communication without an interpreter did not result in effective communication was not material evidence supporting Petitioners' claim that Respondent violated the law. App. A-10.

REASONS FOR GRANTING THE PETITION

The ADA Title II regulations define the standard for compliance with the statutory obligations of public entities concerning accessible communications for deaf people and should be given substantial deference by the courts. The Eighth Circuit's decision in *Loye* creates a conflict in the lower courts concerning the weight the regulations should be given that has a significant impact on the civil rights of deaf people.

Congress directed that the standards for compliance with ADA Title II must be clear and consistent. 42 U.S.C § 12101(b). The Eighth Circuit failed to defer to the ADA Title II regulations and in place of their specific standards created its own standard for compliance with the law. The Eighth Circuit disregarded the ADA Title II regulations requiring that public entities ensure that deaf people are able to fully participate in and equally benefit from their services and that communication with deaf individuals is as effective as communication with people who can hear.

This Court has not yet decided whether the Title II regulations are valid and should be given deference under *Chevron*. *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 591-92 (1999). This Court should accept Petitioners' case for review to preserve uniformity of interpretation of the federal disability discrimination laws consistent with the Congressionally mandated regulations issued by the Department of Justice.

I. The Circuits are Divided Over Whether Courts Must Defer to the ADA – Title II Regulations

The Eighth Circuit's decision creates a division in the court of appeals on the question whether the Department of Justice regulations interpreting Title II of the ADA and the Federal Rehabilitation Act should be given *Chevron* deference. Five circuits have decided that the regulations are entitled to deference:

Second Circuit: *Bartlett v. New York State Board of Bar Examiners*, 226 F.3d 69, 79 (2d Cir. 2000) ("Great deference"), *Innovative Health Systems, Inc. v. City of White Plains*, 117 F.3d 37, 45 n.8 (2d Cir. 1997) ("Controlling weight");

Third Circuit: *Helen L. v. DiDario*, 46 F.3d 325, 331 (3d Cir. 1995) ("Substantial deference");

Ninth Circuit: *McGary v. Portland*, 386 F.3d 1259, 1269 n.6 (9th Cir. 2004) ("Given controlling weight");

Tenth Circuit: *Robertson v. Las Animas Sheriff's Department*, 500 F.3d 1185, 1197 n.7 (10th Cir. 2007); *Marcus v. Kansas Department of Revenue*, 170 F.3d 1305, 1307 n.1 (10th Cir. 1999) ("Substantial deference");

Eleventh Circuit: *Kornblau v. Dade County*, 86 F.3d 193, 194 (11th Cir. 1994).

One circuit specifically held that the ADA Title II regulations concerning communication access (28 U.S.C. § 35.160) are entitled to substantial deference under *Chevron*. *Robertson v. Las Animas Sheriff's Department*, 500 F.3d 1185, 1197 n.7 (10th Cir. 2007).

The Eighth Circuit in *Loye* departed from these holdings by not deferring at all to the ADA Title II regulations. It held that the ADA does not require compliance with the "effective communication" standard in the Title II ADA regulations. App. A-9. By failing to defer to the regulations, the Eighth Circuit created a conflict among the circuits concerning the weight courts should give them. When it created its own standard for compliance with ADA Title II in place of the standard set by the regulations, the Eighth Circuit also departed from the intention of Congress that there be a consistent and strong standard for compliance set by the Department of Justice regulations and applied by all the courts.

The *Loye* decision further undermines the goal of consistent standards regarding accessible communication because those circuits that have not yet determined if the ADA Title II regulations are valid and entitled to deference may be negatively influenced by the Eighth Circuit's failure to give proper deference to the regulations.

The Eighth Circuit's decision has also caused confusion in the district courts. At least one court

has recently followed the Eighth Circuit's test for compliance instead of deferring to the standards for accessible communication and full and equal participation contained in the regulations. *See Bahl v. County of Ramsey*, ___ F. Supp. 2d ____, 2010 WL 5463750 (D. Minn. 2010).

This Court has withheld deciding whether the Department of Justice regulations implementing Title II of the ADA are entitled to deference under *Chevron*. *Olmstead v. L.C.*, 527 U.S. 581, 591-92 (1999). The present case presents an opportunity to resolve the conflict between the circuits and make clear that the courts should give substantial deference to the Title II ADA regulations.[5]

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[5] This Court has decided that the ADA Title III (Public Accommodations) regulations are entitled to *Chevron* deference. *Bragdon v. Abbott*, 524 U.S. 624, 644 and 646 (1998). The requirements of the Title II regulations concerning communication access are essentially identical to the Title III regulations.

II. The Issues Presented by the Conflict Are Important

The ADA Title II regulations provide the basic standards for complying with the statute's requirement that deaf people can fully and equally participate in the programs and services of public entities. The regulations specifically address the need for public entities to ensure that effective communication with deaf persons takes place, so that deaf persons can fully participate in the services of public entities.

Hearing impairment is the sixth most common "chronic condition" in the United States. U.S. Department of Health and Human Services, Prevalence of Selected Chronic Conditions: United States, 1990-1992 (1997). Up to two million deaf people communicate using American Sign Language, and there is enormous variation in deaf people's ability to read and write English fluently. Schwartz, Deaf Patients, Doctors and the Law: Compelling a Conversation About Communication, 35 Fla. St. U. L. Rev. 947, 952 (Summer 2008). There are many misconceptions with regard to communication with the deaf. Many deaf people cannot read and write English fluently. ASL, not English, is their native language. ASL is a language separate from English, with its own vocabulary, syntax and grammar and rules. Lip reading is not an effective means of communication for every deaf person. Less than thirty percent of what someone speaks in English is available visually to someone who is trying to lip

read, because lips are only a part of the process of creating speech.

Congress clearly stated its intention that the standards for compliance with the ADA must be "clear, strong [and] consistent." 42 U.S.C. § 12101(b)(2). The ADA Title II regulations provide those standards. Deference to the regulations ensures the consistency Congress intended. The Eighth Circuit's failure to defer to the standards set by the ADA Title II regulations, and its decision to adopt its own standard, departs from the consistent standard set by the regulations. Its action creates a different and lesser standard in the Eighth Circuit than the standard that exists in other circuits.

A. Congress Intended the Regulations to be a Consistent Standard for Compliance with Federal Disability Discrimination Laws

When Congress passed the ADA, it stated that the purpose of the statute is "(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities; [and] (2) to provide clear, strong, consistent, enforceable standards addressing discrimination against people with disabilities;" 42 U.S.C. § 12101(b) (emphasis added). In order to develop these standards, Congress directed the Department of Justice to issue regulations to implement and enforce Title II of the ADA, including regulations concerning accessible communications. 42 U.S.C. § 12134(b) (App. A-43).

The ADA Title II regulations require public entities to take steps to ensure that people who are deaf enjoy equal participation in and benefit from the programs of the public entity. 28 C.F.R. § 35.160(b)(1) (App. A-45). The regulations also require public entities to provide ASL interpreters or other auxiliary aids to ensure that effective communication with deaf people occurs. They define "effective communication" with deaf persons as "communication that is as effective as communication with others." 28 C.F.R. § 35.160(a) (App. A-45). These regulations provide the "strong, clear [and] consistent" standards concerning accessible communication that Congress intended.

This Court has long recognized that controlling weight should be given to an agency's regulations implementing a statute it is entrusted to administer, unless the regulations are arbitrary, capricious, or manifestly contrary to the statute. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984). This is particularly true when Congress has explicitly directed the agency to develop regulations to implement the statute, as it did for Title II of the ADA. *Id.* at 842-43 A court may not impose its own interpretation of a statute in place of the regulations. *Id.* at 844

The deference courts give to the ADA Title II regulations is significant in all cases involving communication access brought under Title II of the ADA because those regulations set the basic

standard for compliance with the law. The standard must be consistent so all public entities know the standard for complying with the obligations of the ADA, regardless of which circuit they happen to be located in.

When it decided *Loye*, the Eighth Circuit should have deferred to the regulations and applied the standard for compliance set by them. Failing to defer to the standards set by the regulations creates a different, lower standard for complying with the statutes' requirements for communication access obligations in the Eighth Circuit, compared to the standard used in other circuits.

III. The Eighth Circuit's Decision is Erroneous

Instead of deferring to the standards in the ADA Title II and Rehabilitation Act regulations requiring Respondent to provide interpreters or other auxiliary aids necessary to achieve effective communication with deaf people and full participation in its services, the Eighth Circuit erroneously applied a different and lesser test. It evaluated whether Petitioners had what it called "meaningful access" to Respondent's services, without adequately considering either the communication between Petitioners and Respondent, or Petitioners' ability to fully participate in the disaster assistance services.

The Eighth Circuit should have evaluated the evidence in the record (favorably to Petitioners, as the non-moving party) to determine if Petitioners had met their burden of producing evidence showing they were not able to fully and equally participate in the disaster relief services Respondent provided. It also should have evaluated the evidence in the record to determine if communications between Petitioners and Respondent were as effective as communications between Respondent and hearing victims of the mercury spill.

The Eighth Circuit's erroneous analysis is also shown by its misplaced reliance on this Court's opinion in *Alexander v. Choate*, 469 U.S. 287 (1985). *Alexander* was not a case where deaf people were denied accessible communication. It was a case

involving the limitation periods for state Medicaid programs that allegedly disproportionately affected people with disabilities.

The Eighth Circuit incorrectly held that *Alexander* construed a "similarly worded regulation" under the Rehabilitation Act which it never identifies. App. A-9. None of the regulations this Court construed in *Alexander* is at all "similar" to the ADA Title II regulations concerning accessible communication. *Alexander* did not involve any regulation concerning "effective communication" with deaf people.

When the Eighth Circuit looked to *Alexander* for the standards to apply to Petitioners' case, it ignored the explicit requirements concerning communication access found in the ADA Title II and Rehabilitation Act regulations and did not give them the substantial deference *Chevron* requires.

In support of its decision, the Eighth Circuit also misapplied *Randolph v. Rodgers*, 170 F.3d 850 (8th Cir. 1999), which held that a deaf inmate was entitled to "meaningful access" to a prison disciplinary hearing. App. A-4. However, in *Randolph*, the court held that the deaf plaintiff did not have meaningful access to the hearing precisely because the defendant did not provide an interpreter for it. *Randolph*, at 858.

The Eighth Circuit's use of the wrong standard for compliance with the ADA caused it to incorrectly affirm summary judgment against the

Petitioners. In opposition to Respondent's motion for summary judgment, the Petitioners had submitted evidence in the District Court showing that they could not participate fully in the disaster relief services because there was no interpreter. They also submitted evidence showing that they could not communicate effectively with Respondent when there was no interpreter. Petitioners presented testimony that they could not understand much of what Respondent's agents told them and that they could not express their thoughts or questions to Respondents. Petitioners also presented expert testimony that they had limited English language skills and could not effectively communicate using written English. This evidence directly addresses the standards for compliance contained in the ADA Title II regulations.

The Eighth Circuit, applying its own standard, ruled that Petitioners' evidence was not material to determining whether Petitioners had "meaningful access" to the Respondent's services. App. A-10. This evidence would be clearly material if the Eighth Circuit had applied the full participation and effective communications standards found in the ADA Title II regulations.

CONCLUSION

The petition of a writ of certiorari should be granted.

Respectfully submitted,

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Dated: February 14, 2011

APPENDICES

A. Opinion of U.S. Court of Appeals for the Eighth Circuit (Nov. 17, 2010) A-1

B. Judgment of U.S. Court of Appeals for the Eighth Circuit (Nov. 17, 2010) A-14

C. Opinion of U.S. District Court for the District of Minnesota (Aug. 25, 2009) A-15

D. Title II, ADA:

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United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 09-3277

Kevin Loye; Gina Gist; Vikki Marshall; David Stiles,

Plaintiffs - Appellants, Appeal from the United States District Court for District of Minnesota.

v.

County of Dakota,

Defendant - Appellee.

Submitted: June 16, 2010
Filed: November 17, 2010

Before LOKEN, ARNOLD, and GRUENDER, Circuit Judges.

LOKEN, Circuit Judge.

On the afternoon of September 6, 2004, boys stole two bottles of mercury from an abandoned building, took this hazardous substance to a playground near the Rosemount Woods mobile home park, and released it while playing. Before police from the City of Rosemount, Minnesota were notified and arrived at the scene, people, homes, and vehicles were contaminated. Police officers knocked on doors to identify those who had been exposed, and the City contacted state and local agencies to help deal with the environmental and public health emergency. The Special Operations Team (SOT), a disaster response

unit created by an agreement between Dakota County and eleven cities including Rosemount, arrived at about 9:00 p.m. and set up a decontamination tent. Shortly after 11:00 p.m., the SOT began decontaminating forty-nine persons who had been exposed to mercury, including Kevin Loye, Gina Gist, Vikki Marshall, and David Stiles, who are deaf. The next day, nurses from the Dakota County Department of Public Health began attending to the victims' health, housing, and financial needs. The victims were provided temporary housing while their quarantined homes were decontaminated. By the end of the month, the health and environmental hazards were successfully abated.

One year later, Loye, Gist, Marshall, and Stiles filed Charges of Discrimination with the Minnesota Department of Human Rights alleging that Dakota County, the City of Rosemount, the State of Minnesota, and the American Red Cross violated the Minnesota Human Rights Act ("MHRA") when they "failed to provide ASL [American Sign Language] interpreters . . . for all of the services they were providing to the public." In December 2006, the Department issued "No Probable Cause" determinations dismissing the charges against Dakota County. Loye, Gist, Marshall, and Stiles (collectively, "Plaintiffs") then filed this action in federal court, alleging that the County's failure to provide ASL interpreters violated the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12132; Section 504 of the Rehabilitation Act ("RA"), 29 U.S.C. § 794; and the MHRA, Minn. Stat. § 363A.12. Two years later, they sued the City, the State, and the American Red Cross in state court asserting the same MHRA claims and alleging that the Department of Human

Rights found probable cause to support the charges against these respondents.

At the close of discovery, the district court[1] granted Dakota County's motion for summary judgment, concluding that Plaintiffs received effective communication, and therefore meaningful access to the programs and services offered during three relevant periods: (1) the emergency decontamination process; (2) public group meetings between victims and representatives of various government agencies conducted the following week; and (3) additional private meetings between Dakota County Public Health Nurse Gerilee Greeley and individual plaintiffs. Loye v. County of Dakota, 647 F. Supp. 2d 1081, 1090, 1092, 1094, 1095 (D. Minn. 2009). Plaintiffs appeal. Reviewing the grant of summary judgment *de novo,* we affirm. Randolph v. Rodgers, 170 F.3d 850, 856 (8th Cir. 1999) (standard of review).

I. The Decontamination Process.

Plaintiffs argue that Dakota County violated the ADA, the RA, and the MHRA by failing to provide interpreters when Plaintiffs were decontaminated by the SOT on the night of September 6. Title II of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity." 42 U.S.C. § 12132. As relevant here, the substantive standards of § 504 of the RA and the ADA are the same. See 42 U.S.C. § 12133; Gorman v.

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[1] The Honorable James M. Rosenbaum, United States District Judge for the District of Minnesota, now retired.

Bartch, 152 F.3d 907, 911- 12 (8th Cir. 1998).[2] The parties agree that Plaintiffs are qualified individuals with a disability and that Dakota County is a public entity. Although the County was not responsible for the mercury contamination, the governmental effort to decontaminate the victims of that emergency was, without question, a service to which the requirements of § 12132 applied. See Randolph, 170 F.3d at 858. Consistent with the Supreme Court's interpretation of the RA in Alexander v. Choate, 469 U.S. 287, 301 (1985), we construe Title II of the ADA as requiring that qualified persons with disabilities receive "meaningful access" to a public entity's services, not merely "limited participation." Randolph, 170 F.3d at 858. Depending on the circumstances, this may require the use of "auxiliary aids and services," such as interpreters for the hearing impaired. See Mason v. Corr. Med. Servs., Inc., 559 F.3d 880, 886 (8th Cir. 2009), applying 42 U.S.C. § 12131(2) and 28 C.F.R. § 35.104(2).

Plaintiff Marshall was interviewed by Rosemount police at the playground at 6:30 p.m. on September 6. Her son had played with the mercury, and the miscreant boys had poured mercury in her eight-year-old daughter Cassie's hair. Marshall became contaminated when she comforted Cassie. She told the officers she was deaf and asked for an interpreter. The home of Plaintiffs Loye and Gist became one of the most contaminated when the boys brought the jars of mercury to the residence and

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[2] In general, the ADA and the MHRA are also construed the same. See Somers v. City of Minneapolis, 245 F.3d 782, 788 (8th Cir. 2001). Plaintiffs' brief asserts in a footnote that Minn. Stat. § 363A.12, subd. 1, "imposes more stringent requirements" than the ADA, but they make no separate MHRA argument.

spilled some. Loye and his son Cory touched the unknown substance. A police officer came to the residence and wrote "mercury" when Loye said he was deaf. Loye misunderstood the message and told Gist that someone had been molested.

Beginning at 11:00 p.m., each family identified as needing decontamination entered the SOT's tent (sequentially, not all at once). Once inside, they removed their clothes and jewelry and were sprayed and brush scrubbed with soap and water. They were then given suits or blankets to cover themselves and boarded a bus that took them to a hotel shelter the American Red Cross had arranged. As no interpreter was present, the SOT communicated with those who were deaf by gesturing, lip reading, writing, and limited sign language. Marshall's household included her two children, then-fiancé Jeff Beaman, a hearing person, and Stiles, who was visiting. This family was among the first to be decontaminated because Cassie was the most seriously contaminated victim. After decontamination, Marshall accompanied Cassie to a local hospital for testing and treatment. Plaintiffs Loye and Gist and their three-year-old son were the last to be decontaminated. All Plaintiffs were understandably confused and afraid throughout the harrowing decontamination process.

In granting summary judgment on this claim, the district court focused on the SOT's services "during the emergency midnight decontamination." The court concluded that the ADA did not require "delay in protecting the public or in ameliorating such a danger," that it was not reasonable to require the emergency responders to come equipped with a full-time interpreter, and that Plaintiffs' ability to follow directions and complete the successful

decontamination demonstrated that, despite the absence of interpreters, "[t]he communications were effective." Loye, 647 F. Supp. 2d at 1088-89.

On appeal, Plaintiffs argue that they first asked the police for interpreters hours before the decontamination began, so the district court erred because no delay in handling the emergency would have occurred had interpreters been timely provided.[3] To consider this contention requires a more detailed look at the chronology of events on the night of September 6. Rosemount Police responded to the report of a suspicious substance at 6:30 p.m. Police Sergeant Erickson and Assistant Fire Chief Haeg were the City's incident commanders at the scene. They requested SOT assistance at 9:00 p.m. SOT members arrived with their equipment at about 9:20 p.m. It is undisputed that (i) the SOT performed decontamination tasks assigned by the incident commanders, (ii) no SOT member had contact with contamination victims, including Plaintiffs, until they were brought to the SOT tent to be decontaminated, and (iii) Dakota County had no responsibilities (or even presence) on September 6 other than the SOT.[4]

Given Dakota County's lack of overall responsibility or involvement other than that of the SOT, Plaintiffs are forced to contend that Dakota County is liable for the failure of City of Rosemount police officers and incident commanders to have interpreters available when the SOT decontaminated

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[3] We reject as meritless Plaintiffs' additional contention that the district court decided an issue not fairly presented by the County's motion for summary judgment.

[4] The County argues that it is not liable under the ADA for the actions of the multi-agency SOT. Like the district court, we need not reach that issue.

the victims later that night. Plaintiffs cite no authority supporting this theory of joint governmental liability.

Perhaps it would be at issue if Plaintiffs had not split their claims and sued the other responding public entities in state court. But given the decision to split their claims, their liability-without-fault theory in this case raises, as the district court noted, the spectre of double damage recoveries. Therefore, on this record, while we have little doubt that Plaintiffs had need of interpreters when the emergency decontamination services began, they failed to prove that the County was responsible for interpreters not being present. The SOT's services began when Plaintiffs were brought to the decontamination tent. Viewing the situation at that point in time, we agree with the district court that the means of communication SOT members then employed provided Plaintiffs with timely, meaningful access to the emergency decontamination services. See Mason, 559 F.3d at 887-88. Loye testified that he asked a fireman for an interpreter when he was brought to the decontamination tent. The fireman was presumably part of the SOT, but at that point, "waiting for an oral interpreter . . . [wa]s not a reasonable modification of [SOT] procedures given the exigent circumstances" of an emergency hazardous materials decontamination. Bircoll v. Miami-Dade County, 480 F.3d 1072, 1086 (11th Cir. 2007).[5]

[5] Loye and Marshall requested an interpreter after boarding the bus that would take them to the hotel shelter. But the decontamination had ended, and Dakota County was not responsible for providing the bus or the temporary shelter.

II. The Large-Group Meetings.

After the decontamination, Plaintiffs were provided temporary housing until their homes had been decontaminated by the Minnesota Pollution Control Agency. The Dakota County Department of Public Health assumed responsibility for arranging a series of large public meetings at which officials from the various responding agencies discussed the health effects of exposure to mercury, the need to decontaminate homes and cars and to investigate whether children and pets had been exposed, the temporary housing arrangements, and when their homes could be reoccupied. When the Department learned on September 7 that some victims were hearing impaired, efforts were made to have interpreters present at these meetings.

In support of its motion for summary judgment, the County presented evidence that an interpreter was present at all of the six to eight large-group meetings held from September 7 through September 15. In response, Plaintiffs presented Vikki Marshall's testimony that the County failed to notify her of the first meeting on September 7, that no interpreter was present at two meetings, and that communication at two other meetings was imperfect because the interpreter spent time at individual discussions with Loye and Gist instead of interpreting the large-group discussion. The testimony of Loye and Gist was consistent with the County's claim that an interpreter was provided at every large-group meeting.

Rejecting Plaintiffs' contention that "an interpreter is mandated for every meeting," the district court concluded that, considering the series of meetings as a whole, "plaintiffs received effective

communication." Love, 647 F. Supp. 2d at 1090. The court noted that, on September 8, County officials obtained an interpreter for the large-group meeting and then held an additional ASL-interpreted private meeting at which deaf evacuees could ask questions. "Plaintiffs identify no information they missed nor any harm suffered as a result of any alleged failure to provide interpreters." Id. at 1091.

On appeal, Plaintiffs argue the district court erred when it disregarded the requirement in the Attorney General's regulations that the County "ensure that communications with [Plaintiffs] are *as effective as* communications with others." 28 C.F.R. § 35.160 (emphasis added). We disagree that Title II of the ADA demands compliance with Plaintiffs' literal reading of this regulation. The Supreme Court construed a similarly worded regulation under § 504 of the RA as meaning that "benefits, and services, to be equally effective, are not required to produce the identical result or level of achievement for handicapped and nonhandicapped persons, but must afford handicapped persons equal opportunity to . . . gain the same benefit." Therefore, the Court concluded, "Tennessee is not required to assure that its handicapped [program] users will be as healthy as its nonhandicapped users." Alexander, 469 U.S. at 305-06. "Any interpretation of § 504, " the unanimous Court explained, "must . . . be responsive to two powerful but countervailing considerations -- the need to give effect to the statutory objectives and the desire to keep § 504 within manageable bounds." Id. at 299.

In our view, the same principles apply in construing Title II of the ADA and its implementing regulations. We agree with the district court that

Dakota County effectively communicated with Plaintiffs at the large-group meetings for the reasons the court explained. After the events of September 6, the primary services were to decontaminate the victims' property, attend to their health care and related needs, provide temporary shelter, and assist them in moving back into their homes. Providing timely information about the risks of mercury and the decontamination process was an important aspect of effective emergency response services. But there is a difference between providing information -- a service -- and the series of meetings at which information is provided. Plaintiffs confuse the two when they argue that Title II required that an ASL interpreter must be present at every meeting. Therefore, the fact disputes Plaintiffs emphasize were not material to the grant of summary judgment because the record establishes they had meaningful access to the services provided all evacuees. Compare Robertson v. Las Animas County Sheriff's Dep't, 500 F.3d 1185, 1199 (10th Cir. 2007) (summary judgment denied because deaf detainee could not hear what was happening at his probable cause hearing); Aikins v. St. Helena Hosp., 843 F. Supp. 1329, 1336 (N.D. Cal. 1994) (summary judgment denied because physician's misunderstanding undercut defendant's allegation that communication with patient's deaf spouse was effective). Here, even if at times delayed, the information communicated during the large-group meetings was not so time-sensitive that the delay denied Plaintiffs effective communication and meaningful access to the services being provided.

III. The Individual Family Meetings.

Along with arranging the large-group meetings, the Department of Public Health assigned

experienced Public Health Nurse Greeley to provide housing, health-related, and other services on an individual basis to hearing impaired evacuees, including Plaintiffs. Nurse Greeley met about ten times with Loye and Gist. Greeley obtained a prescription drug and scheduled a doctor's appointment for Loye, helped Loye and Gist move to temporary housing, advised when group meetings would be held, provided a booklet and list of resources for obtaining financial aid and transportation services, scheduled an appointment to select a new carpet for their decontaminated home, and advised when they could return home. Greeley provided an ASL interpreter for at least two of the first three meetings. After that, Greeley's detailed contemporaneous notes reflect that less complex issues were discussed without an interpreter, using lipreading or writing, and the record confirms that she frequently communicated with Loye via email. The home of Loye and Gist was one of the last to be decontaminated; they returned on September 23.

Nurse Greeley met less often with Vikki Marshall, and when they did meet, Marshall's then-fiancé Beaman, who could hear, was often present. Greeley met with Marshall and Beaman on September 8 and discussed Cassie's medical status. The next morning, Greeley picked up Cassie's urine sample and delivered it to the hospital. Later that day, Marshall and Beaman returned to their home, one of the first to be decontaminated. After that, Greeley met with or called Marshall or Beaman about five times, obtaining shampoo and prescription medicine, making sure Cassie's health tests were completed, advising what community services were available, and providing forms to obtain emergency

funds for spill victims. Marshall testified there was no interpreter present during these contacts. Nurse Greeley testified that she communicated with Marshall via written notes or through Beaman.

The district court concluded that no reasonable jury could conclude that Nurse Greeley failed to communicate effectively with Loye, Gist, and Marshall at these individual meetings. With the exception of Cassie Marshall's blood and urine tests, which were normal, the communications focused on housing, social services, and financial assistance, with Nurse Greeley serving as a helpful intermediary for services provided by other government agencies. At various times, Nurse Greeley communicated with Plaintiffs through interpreters, lipreading, written messages, email, and Beaman. She also provided written instructions, written resource lists, and a TTY contact number. The topics discussed were not complex, and Plaintiffs' responses and actions taken reflected that Nurse Greeley's assistance was understood. 647 F. Supp. 2d at 1094-95.

On appeal, Plaintiffs argue that summary judgment was improper as to this aspect of their claims because the record demonstrates that they "could not fully communicate their questions and concerns" in the individual meetings with Nurse Greeley. But, as we have explained, the legal standard is effective communication that results in meaningful access to government services. There is no evidence that Plaintiffs failed to obtain any service because Nurse Greeley's advice or assistance was not understood, and no evidence Nurse Greeley ignored a specific request for more effective communication or refused a specific request for an ASL interpreter. See Mason, 559 F.3d at 887; Rosen v. Montgomery

County, Md., 121 F.3d 154, 158 (4th Cir. 1997).

The personal items Greeley delivered, the emails between Loye and Greeley, and Plaintiffs' successful return to their decontaminated homes are strong evidence of effective communication, and Plaintiffs presented no evidence to the contrary. See Bircoll, 480 F.3d at 1086 (deaf person's response to police instructions demonstrate effective communication). Indeed, because Nurse Greeley provided individualized assistance only to hearing-impaired evacuees, there is no evidence that her communication with Plaintiffs was less effective than the Department of Public Health's communications with the large number of non-impaired evacuees. Plaintiffs complain they were unable to ask Nurse Greeley questions about the long-term effects of being exposed to mercury. But that was not Greeley's area of expertise, and there is no evidence Plaintiffs were unable to obtain that information from Nurse Greeley or from other sources.

The judgment of the district court is affirmed.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 09-3277

Kevin Loye; Gina Gist;
Vikki Marshall; David Stiles,

Plaintiffs - Appellants

v.

County of Dakota,

Defendant - Appellee

Appeal from U. S. District Court for the District of Minnesota - Minneapolis
(0:07-cv-00255-JMR)

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

November 17, 2010

Order Entered in Accordance with Opinion:
Clerk, U. S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
07-CV-255 (JMR/FLN)

Kevin Loye, Gina Gist, Vikki Marshall, and David Stiles	)	
	)	
v.	)	ORDER
	)	
County of Dakota	)	

An environmental emergency occurred in Dakota County, Minnesota. Dakota County responded. As a result, the County is a defendant in this lawsuit. One is reminded that it takes very little to turn a simple problem into a "federal case." Ultimately, however, it is also a reminder that not all federal cases are meritorious.

Defendant moves for summary judgment. The motion is granted.

I. Background[1]

On Labor Day, September 6, 2004, two children broke into an abandoned building in the City of Rosemount, Minnesota ("the City" or "Rosemount"). The break-in occurred near Rosemount Woods, a mobile home park. Rosemount is located in Dakota County, Minnesota.

The children found and stole two bottles of mercury apparently abandoned in the building. They took the mercury to a nearby playground. A neighbor saw the activity in the park and called the police, who responded, recognizing mercury as a hazardous substance.

[1] The Court considers the facts most favorably to the plaintiffs, as non-moving parties.

Dakota County's first responders were prepared for such an event, their preparations having begun, a year before, in September 2003. At that time, Dakota County and eleven of its municipalities executed a joint powers agreement. They agreed to create the Dakota County Domestic Preparedness Committee. The Committee and its public entities collectively plan for, and respond to, emergencies and large-scale community disasters.

Putting their training into operation, police officers began knocking on doors to find and quarantine people who might have been exposed to the mercury. When officers knocked on the door of plaintiff Vikki Marshall, she told them she was deaf and asked for an interpreter. Because no interpreter was present, the officers could not comply. All of the plaintiffs and their families were exposed to the mercury. Over the course of the evening, plaintiffs - all of whom are deaf - requested interpreters at least four times, without success.

During the evening, the City requested assistance from other agencies, including the Minnesota Pollution Control Agency, the United States Environmental Protection Agency, the Minnesota Department of Health, and Regions Medical Center. At about 9:00 p.m., the City also requested assistance from the Dakota County Special Operations Team ("SOT").[2] Upon their arrival, the

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[2] The Dakota County Domestic Preparedness Committee established the SOT to conduct rescue operations and serve as a crisis resource for local fire and law enforcement agencies. Its members are specially trained law enforcement, fire, and emergency services workers employed by Dakota County or one of the other parties to the joint powers agreement. The SOT is not, itself, a first responder organization.

Rosemount Fire Department Incident Commander placed the SOT in charge of decontamination. Shortly after 11:00 p.m., the SOT, assisted by the Inver Grove Heights Fire Department,[3] began decontamination operations.

The SOT set up a decontamination tent, which housed a shower to remove or neutralize the mercury contamination. Decontamination team members stood at the beginning of the line leading to the tent. They orally instructed residents to remove all their clothing, eyeglasses, and jewelry. These items were to be collected and labeled. Those exposed to the mercury would undergo successive washings, after which they would be clothed in a Tyvek suit. (Pott Dep. 70.) Jeff Beaman, Marshall's live-in boyfriend, is a hearing person. He accompanied Ms. Marshall in line and heard the instructions. Marshall can lip read, but lip reading was complicated by darkness and the masks worn by many decontamination team members.

Marshall and her daughter, Cassie, then 8 years old, were the first to be decontaminated. The children "playing" with the stolen mercury poured some over Cassie's head, making her among the most severely contaminated. Because there was no interpreter, and he did not know American Sign Language, a fireman gestured to Marshall, her daughter, and the rest of the family to get them into the decontamination tent.

As plaintiffs passed through the line, the

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[3] For convenience, the Court refers to those conducting the decontamination - whether individual members of the SOT or members of the Inver Grove Heights Fire Department - as the "decontamination team."

decontamination team attempted to communicate by speaking to their hearing family members, and by pointing and gesturing, directing them where to go and what to do. It was now well past 11:00 p.m.; no interpreter was present, although plaintiffs had requested one.

Plaintiffs complied with the decontamination team's hand gestures, removing their clothing, surrendering their personal items, and submitting to cold water spray rinses and brush scrubs. After the spray-wash, decontaminated individuals received white Tyvek suits. There were not enough Tyvek suits to clothe all of those who had been decontaminated. Plaintiffs Loye and Gist and their three-year-old son were last in line. They received blankets for cover. None of the evacuees - hearing or deaf - were permitted to return home. They were, instead, taken by bus to a nearby AmericInn Motel which the Red Cross secured as an emergency shelter.[4]

These experiences - undoubtedly frightening and disorienting to all who were contaminated - were particularly difficult for the deaf plaintiffs. They found it hard to get information and, lacking information, found it even harder to reassure their children.[5]

Forty-nine people were decontaminated, including the plaintiffs. The last decontamination

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[4] Marshall and Beaman were permitted to take Cassie to the emergency room at Regions Hospital where she was examined.

[5] Marshall states she wanted to ask why simply washing Cassie's hair was not sufficient. She also wanted to tell decontamination team members to be careful of her own recent-surgical scar. Gist states she wanted to ask what was going on and what would happen to her clothes.

was completed shortly before 2:00 a.m., on September 7. After treating the contaminated individuals and taking them to the emergency shelter, the decontamination team turned its attention to their residences. Twelve mobile homes, including Marshall's, Loye's, and Gist's, were declared public health nuisances due to high levels of mercury. The Minnesota Pollution Control Agency began contamination abatement, which continued over the next few days.

Dakota County became directly involved in the response effort on September 7, when its Department of Public Health ("Public Health") assumed responsibility for the evacuees' health and housing needs. During the evening of September 7, barely 24 hours after the mercury theft, the City held an evacuees' meeting at the emergency shelter. An American Sign Language ("ASL") interpreter was present. Plaintiffs maintain they were not told about the meeting, and therefore, did not attend.

Over the next week, Public Health and other responding entities conducted several community meetings for evacuees. The meetings were designed to update and explain the home decontamination process, provide counseling, and answer questions. ASL interpreters were provided for most, if not all, of these meetings. Marshall complains that at two of the meetings she had communication difficulties, even though an interpreter was present. She contends it was difficult to get her questions answered, because the interpreter worked exclusively with plaintiffs Loye and Gist.

On September 8, Public Health officials met to plan and assign follow-up tasks related to the evacuees' health and housing needs. A Public Health

nurse was assigned to each displaced household. Nurse Gerilee Greeley was assigned to plaintiffs' households and was told she would be working with several deaf individuals.

Beginning on September 8, plaintiffs met individually or in family groups with Nurse Greeley. Loye and Gist had an interpreter for their initial meeting with Greeley; Marshall claims she did not. After assessing plaintiffs' medical needs and their communication preferences and abilities, Greeley decided she could communicate effectively with plaintiffs without an interpreter. The parties dispute whether plaintiffs asked for an interpreter or consented to alternative means of communication.

Plaintiff David Stiles, a guest of plaintiffs Marshall and Beaman, returned to his home in Shakopee on September 9, 2004, three days after the mercury incident. Marshall and Beaman returned to their home the same day. Loye and Gist, whose home was among the worst contaminated, could not return until September 23. Nurse Greeley continued to assist plaintiffs through the end of September 2004.

A year later, in September 2005, plaintiffs filed charges with the Minnesota Department of Human Rights. They claimed that, during the decontamination period, Dakota County Public Health Services failed to provide interpreters, violating the Minnesota Human Rights Act, Minn. Stat § 363A.12. The Commissioner dismissed the charges on December 7, 2006. This action was filed on January 19, 2007. Defendant now moves for summary judgment.

II. Analysis[6]

Summary judgment is appropriate when the evidence, viewed in the light most favorable to the nonmoving party, presents no genuine issue of material fact. Fed. R. Civ. P. 56; Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 246 (1986). The party opposing summary judgment may not rest upon the allegations set forth in its pleadings, but must produce significant probative evidence demonstrating a genuine issue for trial. See Anderson, 477 U.S. at 248-49.

Plaintiffs allege violations of Title II of the Americans with Disabilities Act, 42 U.S.C. § 12132 ("ADA"),[7] Section 504 of the Rehabilitation Act, 29 U.S.C. § 794(a) ("RA")[8], and the Minnesota Human Rights Act, Minn. Stat. § 363A.12, subd. 1 ("MHRA").[9] Each statute prohibits discrimination on

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[6] The Court assumes, without deciding, plaintiffs possess Article III standing. Accordingly, it has not considered plaintiffs' supplemental memorandum on that subject. [Docket No. 60.]

[7] Title II of the ADA states, in relevant part: "[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."

[8] Under § 504 of the Rehabilitation Act, no otherwise qualified individual with a disability shall be "excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

[9] The Minnesota Human Rights Act provides, in relevant part: "It is an unfair discriminatory practice to discriminate against any person in the access to, admission to, full utilization of or benefit from any public service because of . . . disability . . . or to fail to ensure physical and program access for disabled persons

the basis of disability. For analytic purposes, each is identical. See Randolph v. Rogers, 170 F.3d 850, 858 (8th Cir. 1999) (ADA and RA); Somers v. City of Minneapolis, 245 F.3d 782, 788 (8th Cir. 2001) (ADA and MHRA).

Plaintiffs, who would state a prima facie case under any of the statutes, must show (1) they are qualified individuals with a disability; (2) they were denied the benefits of a public entity's service or program, or otherwise discriminated against; and (3) the denial or discrimination was based on their disability.[10] Randolph, 170 F.3d at 858.

Defendant acknowledges it is a public entity and plaintiffs are qualified individuals with disabilities. The County, however, denies plaintiffs have shown a triable issue as to elements 2 and 3, resulting in a failure of their prima facie case. To survive summary judgment, therefore, plaintiffs must come forward with facts from which a jury could find Dakota County denied them the benefit of its services, or otherwise discriminated against them, because they are deaf.[11]

A disabled individual is denied the benefit of a public entity's programs, activities, or services when

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unless the public service can demonstrate that providing the access would impose an undue hardship on its operation."

[10] The Rehabilitation Act adds an additional requirement: the program or activity from which the plaintiff was excluded must receive federal financial assistance. Randolph, 170 F.3d at 858. Defendants have not challenged plaintiffs' ability to establish this element.

[11] The ADA permits an affirmative defense that the requested modification is unduly burdensome. Randolph, 170 F.3d at 858. Because the County did not advance this defense, it is not considered.

he or she does not receive "meaningful access" to those services. Id. Limited participation in such services is not equivalent to "meaningful access." Id.

The federal regulations illuminate Title II, and illustrate those services public entities must provide to assure meaningful access.[12] Public entities must "take appropriate steps to ensure that communications" with deaf persons are "as effective as communications with others." 28 C.F.R. § 35.160(a). Such steps may include furnishing "appropriate auxiliary aids and services 28 C.F.R. § 35.160(b)(1). For deaf persons, these include:

> Qualified interpreters, notetakers, transcription services, written materials, telephone handset amplifiers, assistive listening devices, assistive listening systems, telephones compatible with hearing aids, closed caption decoders, open and closed captioning, telecommunications devices for deaf persons (TDD's), videotext displays, or other effective methods of making aurally delivered materials available to individuals with hearing impairments.

28 C.F.R. § 35.104(1). A "qualified interpreter" is "able to interpret effectively, accurately and impartially both receptively and expressively, using any necessary specialized vocabulary." Id.

When providing auxiliary aids or services, the public entity must give "primary consideration to the requests of the individual with disabilities." 28 C.F.R.

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[12] The Eighth Circuit Court of Appeals considers Title II's regulations "instructive" when interpreting the ADA and the RA. See Gorman v. Bartch, 152 F.3d 907, 913 (8th Cir. 1998).

§ 35.160(b)(2). The Eighth Circuit has also recognized, however, that giving "primary consideration" does not mean a public entity must always supply exactly what is requested. See Petersen v. Hastings Public Schools, 31 F.3d 705, 708-09 (8th Cir. 1994). The question is whether there has been effective communication. Id. at 709.

Effective communication must be considered in context. The cases construing these regulations make clear that auxiliary aids appropriate in one context, may not be considered effective in another. 28 C.F.R. Pt. 35, Appendix A, commenting on Section 35.160; Chisholm v. McManimon, 275 F.3d 315, 326 (3d Cir. 2001).

As stated by the Eleventh Circuit:

> [i]n many circumstances, oral communication plus gestures and visual aids or note writing will achieve effective communication. In other circumstances, an interpreter will be needed. There is no bright-line rule, and the inquiry is highly fact-specific.

Bircoll v. Miami-Dade County, 480 F.3d 1072, 1087 (11th Cir. 2007). If the facts clearly show effective communication, there is no need for a trial and summary judgment is proper. Id. at 1088 (affirming grant of summary judgment for defendant).

Title II also prohibits public entities from discriminating against disabled individuals based on their disability. There must be "reasonable modifications in policies, practices, or procedures" to avoid discrimination, unless "making the modifications would fundamentally alter the nature of the service, program, or activity." 28 C.F.R. §

35.130(b)(7). The adequacy of these "reasonable modifications" is highly fact-specific. Bircoll, 480 F.3d at 1086.

Accordingly, the Court considers whether plaintiffs received effective communication during the response to the Rosemount mercury incident, and if not, whether their requested modification - providing an ASL interpreter - was reasonable at the time. The Court considers these elements in the context of the developing events.

1. The Decontamination[13]

These events began on Labor Day, Monday, September 6, 2004, at the end of the three-day weekend. The boys began "playing" with their stolen mercury in the afternoon. Organized decontamination began at approximately 11:00 p.m. that night - a time when no ASL interpreters were present.

The Court finds exigent circumstances existed the night of September 6-7. This was an extreme environmental and personal health emergency occurring in real time. Individuals – including plaintiffs - had been directly exposed to a dangerous environmental contaminant, capable of causing long-lasting or permanent effects.

Neither the statutes before this Court, the law, or logic, require a delay in protecting the public or in ameliorating such a danger. To require that an

[13] Dakota County questions whether it is legally responsible for immediate decontamination procedures at all, arguing the procedures were conducted by the SOT, a separate legal entity. Plaintiffs reply that the County effectively controls the SOT, and may be liable for actions of joint powers parties. The Court need not resolve this dispute, as it finds there was no violation of the ADA, the RA, or the MHRA.

ASL interpreter be present under these emergency conditions would be equivalent to requiring that every fire truck be equipped with a full-time interpreter, lest it come upon a burning home with deaf and sleeping residents, and then be faced with a civil rights lawsuit for attempting a rescue by breaking down the door in the absence of an interpreter. It is similarly unavailing to argue that either this decontamination team, or the hypothetical firefighter, ought to keep an ASL interpreter on hand 24 hours a day, 365 days a year, to guard against such a possibility. Neither the words nor the intent of these statutes impose such a requirement.

The Court does not question or doubt the terrors of that night. But when these first responders made their hand gestures, the information they conveyed was brief and simple: Come here. Remove your clothes. Put your items in the bag. Go over there.

The communications were effective. Plaintiffs, themselves, testified they followed these directions. Their ability to absorb and comply with these directions shows the messages were conveyed and received. See Bircoll, 480 F.3d at 1086 (suspect's compliance with field sobriety tests showed communication was effective). Taking plaintiffs' evidence in the strongest light, it shows that hearing persons had - at most - a few more minutes' notice of what would happen in the decontamination process. Under these middle-of-the-night emergency circumstances, any failure to provide an interpreter does not rise to the level of a violation of law.

While imperfect, the gestures, pointing, and oral communications with hearing family members were "not so ineffective that an [ASL] interpreter was

necessary to guarantee that [plaintiffs] were on equal footing with hearing individuals." Bircoll, id. Plaintiffs may have wanted to ask questions, but there is no evidence that anyone - deaf or hearing - would have been permitted to ask questions under these circumstances.

While the Eighth Circuit Court of Appeals has not spoken to the issue, other Circuits have found exigent circumstances are a consideration when deciding whether reasonable modifications were in place. "Accommodations that might be expected when time is of no matter become unreasonable to expect when time is of the essence." Waller v. City of Danville, 556 F.3d 171, 175 (4th Cir. 2009) (ADA did not require police to contact mentally ill suspect's family or mental health professionals during two-hour hostage standoff); see also Tucker v. Tennessee, 539 F.3d 526, 536 (6th Cir. 2008) (ADA did not require police to obtain an interpreter before arresting deaf persons involved in assault); Bircoll, 480 F.3d at 1086 (ADA did not require police to obtain an interpreter before administering roadside field sobriety tests).

The emergency responders' first duty was to secure the area and protect public health and safety. Any delay increased the risk to these individuals, and the community at large. In such exigent circumstances, the Court finds it is not reasonable to wait[14] for an interpreter. See Bircoll, 480 F.3d at

[14] According to plaintiffs, "[i]nterpreter provider agencies could have provided an interpreter" in the four hour period between Marshall's first request and the start of decontamination operations. (Pl. Mem. at 19.) This conclusion finds no support in the record. Assuming their testimony would be admissible at trial, plaintiffs' experts utterly fail to show that defendants could have obtained the services of a qualified ASL interpreter

1086.

Plaintiffs bring their claims pursuant to statutes. But even Constitutional protections stand aside in the face of exigent circumstances. See, e.g., Brigham City, Utah v. Stuart, 547 U.S. 398, 403 (2006) (exigent circumstances render warrantless entry into home objectively reasonable under Fourth Amendment); United States v. Banks, 540 U.S. 31, 37 (2003) (same, for forcible entry on "knock-and-announce" warrant). In such cases, "[t]he need to protect or preserve life or avoid serious injury is justification for what would otherwise be illegal absent an exigency or emergency." Brigham City, id. (internal quotations omitted).

Faced with the occurrences on the night of the incident, the absence of an interpreter during the emergency midnight decontamination did not violate plaintiffs' rights under the ADA, the RA, or the MHRA. The Court finds plaintiffs received effective communication; no reasonable jury could find to the contrary.

2. Large Group Meetings

Whether or not an interpreter is needed in any particular situation is also fact-specific. Bircoll, 480 F.3d at 1087. The County need not "employ any and

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on short notice on the last night of a holiday weekend. One expert contends that one of the Twin Cities' three 24-hour interpreter agencies "might have been able to provide interpreters if they had been contacted on the evening of the incident, and more than likely would have been able to provide interpreters on the subsequent days." (Expert Witness Report of Marty Barnum at 10.) Dakota County had no 24-hour interpreter contract in place. (Id.) Even if it had, plaintiffs' other expert claims there is no guarantee a 24- hour interpreter agency could have actually supplied an interpreter. (Expert Witness Report of Trudy Suggs at 5, 15.)

all means" to make auxiliary aids available, but must make "reasonable modifications." Bircoll, 480 F.3d at 1082 (citing Tennessee v. Lane, 541 U.S. 509, 531-32 (2004)). As the United States Supreme Court has recognized, "meaningful access" strikes a balance between "two powerful but countervailing considerations - the need to give effect to the statutory objectives and the desire to keep [the statutes] within manageable bounds." Alexander v. Choate, 469 U.S. 287, 298 (1985) (interpreting the Rehabilitation Act).

Applying these principles, the Court considers the meeting series as a whole, and finds plaintiffs received effective communication. All parties agree: Dakota County provided ASL interpreters at most[15] of the large group meetings. Only Marshall claims that meetings occurred without an interpreter. She denies the presence of an interpreter at two meetings, but has not testified consistently in this regard.

Marshall claims no interpreter attended a meeting in the lobby of the AmericInn purportedly occurring the morning September 8, 2006. No other witness, however, recalls this meeting, and the County has no record of it. Plaintiffs offer no evidence other than Marshall's recall of any such meeting. There is no evidence of what was discussed, or which, if any, County employees were present.[16] On these facts, no jury could find the County deprived

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[15] The County has produced interpreter invoices showing attendance at all large group meetings. (Keena Aff. Ex. 33.)

[16] If the County is correct and there was no meeting, there was, perforce, no subject. Plaintiffs allude to pages 99-107 of Marshall's deposition. (Pl. Mem. at 10.) They have, however, provided only page 100, as well as Marshall's affidavit, neither of which shed any light on what occurred at this meeting.

Marshall of effective communication at this meeting because she was deaf.

Marshall makes similar claims about a September 10 meeting at the Eagan Community Center. (Marshall Dep. at 120). Yet her testimony denying an interpreter's presence is contradicted not only by her own later-filed affidavit, but also by Loye. (See Marshall Aff., Ex. A; Loye Dep. at 166.) From this inconsistent and contradictory evidence, no reasonable jury could find the County failed to provide an interpreter at the September 10 meeting.

Finally, Marshall denies an interpreter attended a meeting at the Rosemount Fire Station on September 15. (Marshall Dep. 124, Marshall Aff. ¶ 6 and Ex. A.) Here, she testified she was told an interpreter was coming, but she "gave up" waiting and decided to leave before the interpreter arrived. (Marshall Dep. 124-25.) The County's evidence shows an interpreter was present. Again, no reasonable jury could find from this evidence that the County failed to provide an interpreter at the September 15 meeting.

Even if the Court were to assume Marshall is correct and no interpreters were provided at these three group meetings, the Court would find no violation of the statutes. The Supreme Court's balance between effecting the statutory objectives and maintaining manageable bounds, see Alexander, 469 U.S. at 298, reasonably means not every event can be interpreted in real time. There must, however, be effective communication and, when needed, reasonable modifications. As already noted, these are fact-specific inquiries. If no interpreter was present at a particular meeting, the Court finds it a reasonable modification to afford deaf plaintiffs an

opportunity to learn the information presented at the meeting and ask questions within a reasonable time.

This is exactly what happened here. On September 8, Public Health employee Jon Springsted was at the AmericInn in advance of a large group meeting scheduled for that afternoon.[17] Marshall asked him for an ASL interpreter, which Springsted obtained for the afternoon group meeting. He also arranged an ASL-interpreted private meeting afterward for deaf evacuees, to assure everyone had an opportunity to ask questions. If Marshall had questions about what had happened at the morning meeting, she had an opportunity to ask later that day. This is effective communication; providing interpreters at subsequent meetings and arranging for a private meeting within a reasonable time were reasonable modifications.

Marshall also claims that, on the afternoon of September 8 and again on September 15 -- both times when an interpreter was provided -- she did not always receive effective communication. Here she claims the interpreter worked exclusively with Loye and Gist. Even if true, these facts do not establish a prima facie case of a statutory violation. The County provided one interpreter to assist a handful of deaf individuals. Providing additional interpreters is not reasonable. Nothing in the law requires that each deaf person be afforded their own interpreter. The Court will not impose such an obligation.

Marshall's testimony, if believed, tends to show Loye and Gist may have monopolized the

[17] It seems possible that this individual conversation may have been the "public meeting" Ms. Marshall claims was not interpreted. If so, there was no statutory violation: she asked for an interpreter, and one attended the afternoon meeting.

interpreter's attention, and rather than intervene, Marshall acquiesced. Nothing, and certainly no act by the County, prevented Marshall from asking the interpreter to assist her. But she did not. If there was any extent to which the interpreter favored Loye and Gist over Marshall, that cannot be considered the County's civil rights violation.

On these facts, the County provided effective communication and reasonable modifications. Marshall got the interpreter she sought for the large meeting on September 8. She may not have been pleased with the interpreter's performance on September 8 or 10, and may not have wanted to wait for the interpreter's arrival on September 15. She may not have been satisfied; but the statutes' requirements were.

Plaintiffs insist an interpreter is mandated for every meeting. They are incorrect. While always desirable, the Court declines to hold an interpreter must absolutely be provided for every meeting, regardless of circumstances. The question remains: did plaintiffs receive effective communication? Plaintiffs identify no information they missed, nor any harm suffered as a result of any alleged failure to provide interpreters. See Mason v. Correctional Medical Services, 559 F.3d 880, 888 (8th Cir. 2009) (affirming summary judgment for defendant where plaintiff could not explain how the requested modification was superior to the modification provided by defendant). On these facts, plaintiffs have shown no intentional or systematic denial of interpreter services.

Granting plaintiffs every disputed fact, the Court finds - concerning public meetings - Dakota County provided reasonable and effective

communication. Accordingly, summary judgment in favor of the County is proper as to these claims.

3. Visits by Public Health Nurse

Dakota County first denies that many of Nurse Greeley's contacts were statutorily-defined "services." It argues she provided services "well beyond the scope of her duties," because they involved non-medical assistance. (Def. Amended Mem. at 22). The Court rejects this defense. Under Title II's regulations, the ADA extends to "all services, programs, and activities provided or made available by public entities." 28 C.F.R. § 35.102(a); Yeskey v. Pennsylvania Dep't of Corrections, 118 F.3d 168, 171 (3d Cir. 1997), aff'd, 524 U.S. 206 (1998). A public entity is obliged to provide effective communications for the disabled, even if the topics covered fall beyond an employee's immediate duties.

Indeed, on these facts, the Court cannot find Nurse Greeley acted outside her authority. The Dakota County Department of Health, a public entity, sent Public Health nurses to communicate with displaced County residents on a one-on-one basis. Nurse Greeley contacted plaintiffs over several weeks helping them resolve both medical and non-medical issues arising from the mercury release. She kept detailed notes of her communications, regardless of topic. Her progress notes show both medical and nonmedical issues within the same conversation. (Greeley Dep. Ex. 2.) There is nothing to show the County ever attempted to limit her communications to purely medical issues. As a result, the Court rejects its contention that her communications touching medical issues were "services," while those dealing with other topics were not. The nurse's contacts with the plaintiffs are covered by the ADA,

the RA, and the MHRA.

At the same time, the Court rejects plaintiffs' suggestion that, having provided ASL interpreters at large group meetings, the County was bound to provide them for every future contact, including every one-on-one contact. (Pl. Mem. 24, n. 12.) The statutes and cases do not support this view. As before, the questions remain: were the communication methods chosen by Nurse Greeley effective? If not, was providing an ASL interpreter a reasonable modification?

a. Nurse Contacts With Loye And Gist

Loye and Gist initially met with Greeley on September 8. They were assisted by an ASL interpreter during most of that meeting. They claim they had difficulty communicating once the interpreter left, yet apparently said nothing to Greeley about their concerns. During the meeting, Greeley assessed their ability to communicate with her and decided "we could use sign language interpreters if it was needed depending on what we needed to discuss." (Greeley Dep. at 46.) Loye told Greeley he did not have his blood pressure medication. She brought the required medication to the group meeting later that same day. She told him he needed to see his doctor before getting the prescription refilled. (Id. 51,54.) There is no evidence suggesting he did not receive or understand this information.

Greeley met briefly with Loye and Gist the next morning. The parties dispute whether an interpreter was present. No medical issues were discussed. This meeting focused on the family's imminent relocation to temporary housing. Greeley gave them directions to their new home, and at their

request, called Gist's mother to notify her of their new address and phone number. (Loye Aff. Ex. A; Greeley Dep. Ex. 2 at 1-2.)

On September 10, Greeley met Loye and Gist at the Eagan Community Center. An interpreter was present. No medical issues were discussed. Greeley noted they had reclaimed their van, recovered some personal property, and planned to attend a group counseling session the next day. Greeley said she would provide a resource list including phone numbers for a food shelf and instructions on applying for food stamps. This was the last time Greeley used an interpreter in communicating with Loye and Gist.

A day or two later, Greeley met with Loye and Gist at their temporary home. (Loye Aff. Ex. A at 2; Greeley Dep. Ex. 2.) She opted against bringing an interpreter because she "was just checking in with people to see how they were doing." By this time she knew Loye and Gist had no medical needs related to the mercury incident. (Greeley Dep. at 71.) She gave them copies of a community resource booklet focused on financial and transportation issues, communicating by means of written questions and answers. (Id., and Ex. 2.) Loye had previously used written notes to communicate at his job and in the neighborhood. (Loye Dep. at 38, 65-66.) Having a computer, Loye and Greeley exchanged email addresses and agreed to communicate by email. (Greeley Dep. 73 and Ex. 2; Loye Dep. 175.)

Here there is a question of fact: Loye maintains he and Gist requested an interpreter. Greeley disagrees. (Loye Dep. 173, Greeley Dep. 112-113.) It is clear, however, that Loye and Greeley exchanged several emails over the next two weeks. Not one of these emails either requests an

interpreter, or indicates any lack of understanding.

Greeley told Loye she had scheduled a doctor's appointment for him. Loye emailed an acknowledgment. (Keena Aff. Ex. 19, 20.) Greeley notified Loye that an interpreter would attend the September 15 group meeting. (Keena Aff. Ex. 21.) She made an appointment for Loye and Gist to select new carpet, and later reminded Loye of the appointment. Loye emailed a confirmation. He and Gist went to the appointment and selected new carpeting. (Keena Aff. Ex. 22-25.)

Greeley met with Loye and Gist on September 14, 15, and 16. At these meetings they exchanged written notes. These covered getting food and clothing from the Rosemount Community Action Council ("CAC"), and Greeley's reminder to Loye of his upcoming doctor's appointment. Greeley also delivered an emergency assistance check from the Rosemount Lions Activity Fund.

On September 20, Greeley emailed Loye letting him know the mercury level in the Loye/Gist home was now at safe levels and they could return when the new carpet was installed. (Keena Aff. Ex. 26.) Loye's email response asked for details concerning the return date. Greeley suggested a moving date, letting them know she would stop by with written instructions. (Keena Aff. Ex. 27.) Loye confirmed the meeting. (Keena Aff. Ex. 28.) Greeley met with Loye and Gist on September 22, bringing the promised written instructions, as well as contact information and financial assistance forms. (Love Aff. Ex. A; Greeley Dep. Ex. 2 at 7.) Loye and Gist returned to their home on September 23.

On September 27, Loye emailed Greeley complaining the television was not working, and of

difficulty reaching Dakota County's Economic Assistance office. Greeley emailed back asking for details about the television, and giving further contact information for both the Economic Assistance office and the CAC. (Keena Aff. Exs. 29-30.) That same day, Greeley visited Loye and Gist at home, again communicating by written notes. The next day, September 28, Greeley sent Loye an email, letting him know she had scheduled an appointment for him with the CAC the following morning. Her email also advised Loye and Gist of documents they should bring to the meeting. (Keena Aff. Ex. 31.)

From this recitation, the Court discerns no evidence of any failure of effective communication on Greeley's part in dealing with Loye and Gist. Neither Loye nor Gist were injured in the mercury incident; Greeley's communications focused on housing and social and financial assistance. She obtained replacement prescriptions and checks, made appointments with a doctor and a decorator, and communicated when and where meetings were to occur. Her notes and testimony, supported by Loye's emails, clearly show Loye understood this information. No reasonable jury could find Loye and Gist were denied effective communication for failure to provide an ASL interpreter. Summary judgment is granted in this regard.

b. Nurse Contacts With Marshall

Marshall claims she met with Greeley eight times and no ASL interpreter was present for any of these meetings. (Marshall Aff. ¶ 7.) At several of these meetings, however, Marshall was accompanied by Beaman, who could hear. On these occasions, Greeley spoke to Beaman, whom she expected to convey the information to Marshall. (Marshall Aff.

¶ 8.)

At their first meeting, on September 8, Beaman and Marshall updated Greeley on Cassie's medical status. Greeley learned Cassie's blood and urine was being tested for mercury. Greeley agreed to pick up the urine specimen and deliver it to the hospital. She did so the next morning, talking briefly to Beaman during her visit. (Greeley Dep. 55-56 and Ex. 2.)

Later on September 9, Marshall learned she and Beaman were cleared to return home. (Marshall Aff. Ex. B at 2.) They did so the same day. MPCA employees were present and discussed proper cleaning. Marshall used written notes to communicate, but largely relied on Beaman to communicate with them. (Marshall Dep. at 117.)

On September 10, Greeley met with Marshall at the Eagan Community Center. Marshall told Greeley she lost her watch and engagement ring. Greeley told her to report the lost items to the MPCA. Marshall also advised Greeley she had thrown away some prescription medicine, and Cassie needed more shampoo. Greeley got the shampoo and delivered it to Marshall's home later that day. Greeley called Marshall's pharmacist, who agreed to refill the prescription. Greeley advised Beaman the pharmacist would call when the prescription was ready. (Greeley Dep. Ex. 2.)

On September 13, Greeley called the house telling Beaman Cassie's lab results might not be in until September 15. On the 15th, Greeley called again, asking if Cassie had gone to Regions Hospital for more blood testing. Beaman said Marshall preferred to take Cassie to her regular pediatrician for the test. Greeley scheduled a home visit for the

following day.

On September 16, Greeley visited Marshall and Beaman at home. Greeley had intended to drop off a community resource list and was not accompanied by an interpreter. Beaman was home. Beaman and Marshall advised Greeley of Cassie's doctor's appointment later that day. Greeley told them to have the clinic call her with any questions. Greeley's notes reflect Marshall asked about applying for emergency financial assistance. Greeley agreed to call Beaman later and provide the contact information. She called Beaman with the information the next day. (Greeley Dep. Ex. 2.)

On September 20, Greeley called and again spoke to Beaman. She told him local service organizations had provided emergency funds for spill victims, and she would mail Beaman the release forms needed to obtain the funds. Greeley received the completed release forms, forwarded them, and learned the Beaman/Marshall household received its checks shortly thereafter.

Nurse Greeley's next and last communication with Marshall occurred September 27. She stopped by Marshall's home to visit and check in. Marshall was upset. Beaman was moving out. Greeley gave Marshall another copy of the community resource list, highlighting the TTY (Telephone Typewriter) number for the County Crisis Response Unit. Greeley also told Marshall Cassie's blood and urine tests reflected normal mercury levels. Marshall, for her part, confirmed both she and Beaman got checks from the community service organizations. Marshall advised Greeley she received paperwork and instructions on applying for emergency financial assistance, and she could fill out the forms. This was

a two-way series of communications, unaccompanied by an interpreter.

The Court finds Marshall received effective communication. In these cases Greeley either relayed information through Beaman, or relied on Marshall's lip-reading ability. As with Loye and Gist, the information Greeley conveyed was relatively simple - contact information, appointments, and the like. The sole piece of medical information exchanged was Cassie's normal test results.

Greeley effectively communicated with Marshall through Beaman. When the mercury release occurred, Marshall and her children had been living with Beaman and his son for nearly a year. (Marshall Dep. 16-17.) The evidence clearly establishes Marshall's reliance on Beaman as an intermediary in communicating during the emergency and its aftermath. (Marshall Dep. 45, 79, 91, 93-94, 117.) There is no indication that Marshall ever told Greeley, or anyone else, that communication through Beaman presented any problem.

Similarly, Marshall never indicated to Greeley she needed an interpreter to communicate. Marshall knew how to make such a request, having asked Jon Springsted for an interpreter on September 8. The record does not reflect a single request by Marshall for an interpreter at any of her meetings with Greeley. There is simply is no evidence from which a jury could find Marshall was unable to understand what was happening, or her questions were too complex to be addressed absent an interpreter.

For these reasons, the Court finds Marshall has failed to establish a prima facie case showing Greeley's communication with her was not effective, or that providing ASL interpreters was reasonable to

assure effective communications. Summary judgment for the County is proper.

Having ruled for the County on the merits, there is no need for the Court to consider the County's arguments concerning official immunity for claims under the MHRA.

4. Plaintiff Stiles

The County has moved for sanctions against plaintiff David Stiles. The Court finds sanctions are appropriate. When this motion was argued, Stiles had moved to Washington state, had failed to show up for his deposition,[18] and had offered no evidence whatsoever in response to the County's properly-filed summary judgment motion.

This case has been pending since early 2007. Discovery closed in November 2008. Under Rule 56(e) of the Federal Rules of Civil Procedure, Stiles was obliged to respond to the County's motion for summary judgment with admissible evidence showing a genuine issue of material fact which must be resolved at trial. He has utterly failed to do so.[19]

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[18] Mr. Stiles' deposition was noticed for October 16, 2008. The County scheduled two ASL interpreters for the deposition. Mr. Stiles chose not to return to Minnesota for his deposition. His counsel notified the County of this fact too late for it to avoid paying the interpreters' fee required under the contract. Under these circumstances, it is appropriate to assess the interpreters' fee of $1,050.00 to plaintiffs.

[19] Nearly five months after the summary judgment and sanctions motions were argued, David Stiles returned to Minnesota in August, 2009, and advised the Court, through counsel, that he is "willing and available" to have his deposition taken. The Court rejects his untimely effort to rejoin and prolong this litigation, and denies leave to supplement the record. In an on-the-record telephone conference, subsequent to Mr. Stiles' return, plaintiffs' counsel advised the Court the

There being no issue of material fact, summary judgment for the County is proper as to Stiles' claims.

III. Conclusion

For the foregoing reasons, the Court grants summary judgment for defendant Dakota County as to all claims.

1. Defendant's motion for summary judgment [Docket No. 34] is granted.

2. Defendant's motion for sanctions [Docket No. 38] is granted. Plaintiffs are directed to compensate defendant in the amount of $1,050.00, reflecting the costs for the interpreters provided for Mr. Stiles' deposition.

3. Plaintiff's motion for leave to file a supplemental memorandum [Docket No. 60] is denied.

4. Plaintiff's motion for leave to file the Affidavit of David Stiles [Docket No. 70] is denied.

IT IS SO ORDERED.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: August 25, 2009

s/James M. Rosenbaum
JAMES M. ROSENBAUM
United States District Judge

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summary judgment motion could be decided on the basis of the materials supplied at the time it was heard.

TITLE 42--THE PUBLIC HEALTH AND WELFARE

CHAPTER 126--EQUAL OPPORTUNITY FOR INDIVIDUALS WITH DISABILITIES

SUBCHAPTER II--PUBLIC SERVICES

Part A--Prohibition Against Discrimination and Other Generally Applicable Provisions

Sec. 12132. Discrimination

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

.....

Sec. 12134. Regulations

(a) In general

Not later than 1 year after July 26, 1990, the Attorney General shall promulgate regulations in an accessible format that implement this part. Such regulations shall not include any matter within the scope of the authority of the Secretary of Transportation under section 12143, 12149, or 12164 of this title.

(b) Relationship to other regulations

Except for "program accessibility, existing facilities", and "communications", regulations under subsection (a) of this section shall be consistent with this chapter and with the coordination regulations under part 41 of title 28, Code of Federal Regulations

(as promulgated by the Department of Health, Education, and Welfare on January 13, 1978), applicable to recipients of Federal financial assistance under section 794 of title 29. With respect to ``program accessibility, existing facilities'', and ``communications'', such regulations shall be consistent with regulations and analysis as in part 39 of title 28 of the Code of Federal Regulations, applicable to federally conducted activities under section 794 of title 29.

TITLE 28--JUDICIAL ADMINISTRATION

CHAPTER I--DEPARTMENT OF JUSTICE

PART 35_NONDISCRIMINATION ON THE BASIS OF DISABILITY IN STATE AND LOCAL

Subpart E_Communications Sec. 35.160 General.

(a) A public entity shall take appropriate steps to ensure that communications with applicants, participants, and members of the public with disabilities are as effective as communications with others.

(b)(1) A public entity shall furnish appropriate auxiliary aids and services where necessary to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity conducted by a public entity.

(2) In determining what type of auxiliary aid and service is necessary, a public entity shall give primary consideration to the requests of the individual with disabilities.

TITLE 29--LABOR

CHAPTER 16--VOCATIONAL REHABILITATION AND OTHER REHABILITATION SERVICES
SUBCHAPTER V--RIGHTS AND ADVOCACY

Sec. 794. Nondiscrimination under Federal grants and programs

(a) Promulgation of rules and regulations

No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

TITLE 28--JUDICIAL ADMINISTRATION

CHAPTER I--DEPARTMENT OF JUSTICE

PART 39_ENFORCEMENT OF NONDISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS

Sec. 39.160 Communications.

(a) The agency shall take appropriate steps to ensure effective communication with applicants, participants, personnel of other Federal entities, and members of the public.

(1) The agency shall furnish appropriate auxiliary aids where necessary to afford a handicapped person an equal opportunity to participate in, and enjoy the benefits of, a program or activity conducted by the agency.

(i) In determining what type of auxiliary aid is necessary, the agency shall give primary consideration to the requests of the handicapped person.

(ii) The agency need not provide individually prescribed devices, readers for personal use or study, or other devices of a personal nature.

(2) Where the agency communicates with applicants and beneficiaries by telephone, telecommunication devices for deaf persons (TDD's) or equally effective telecommunication systems shall be used.

(b) The agency shall ensure that interested persons, including persons with impaired vision or hearing, can obtain information as to the existence and location of accessible services, activities, and facilities.

(c) The agency shall provide signage at a primary entrance to each of its inaccessible facilities,

directing users to a location at which they can obtain information about accessible facilities. The international symbol for accessibility shall be used at each primary entrance of an accessible facility.

(d) This section does not require the agency to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. In those circumstances where agency personnel believe that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, the agency has the burden of proving that compliance with Sec. 39.160 would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the Attorney General or his or her designee after considering all agency resources available for use in the funding and operation of the conducted program or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action required to comply with this section would result in such an alteration or such burdens, the agency shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that, to the maximum extent possible, handicapped persons receive the benefits and services of the program or activity.

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(2)

No. 10-1035

Supreme Court, U.S.
FILED
MAR 9 - 2011
OFFICE OF THE CLERK

In the Supreme Court of the United States

Kevin Loye, Gina Gist, Vikki Marshall, David Stiles,

Petitioners,

v.

County of Dakota,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

I. Facts Relevant to the Petition

A. Response to Mercury Spill on September 6, 2004.

On September 6, 2004, at approximately 6:46 p.m., the Rosemount Police Department received a report that two boys were playing with a suspicious material in the Rosemount Woods Manufactured Home Community (Rosemount Woods). Rosemount Woods is located in the City of Rosemount, County of Dakota, State of Minnesota. A Rosemount police officer went to the scene to investigate and in doing so, believed the suspicious material to be mercury. The officer reported her findings to on-duty sergeant Jewell Erickson who then responded to the scene. The Rosemount Fire Department also responded to the scene. Sergeant Erickson was the incident commander for police operations and Rosemount Fire Department Assistant Chief Haeg was the incident commander for fire operations. Rosemount officers went door-to-door seeking to identify individuals and property that may have been contaminated. The Petitioners were among a large group of Rosemount Woods residents, including hearing, deaf, and Spanish speaking residents, identified as possibly being contaminated.

Petitioners Loye and Gist, along with their son Cory resided in a home together in Rosemount Woods. Loye and Gist are deaf. Loye and Cory were directly exposed to the mercury.

Petitioner Marshall, her minor children Cassie and Timothy, Marshall's boyfriend Jeff Beaman, Beaman's minor son, and Bruce Einarson resided in a home together in Rosemount Woods. At the time,

Petitioner Stiles resided in Shakopee, Minnesota, but had been staying as a guest at the Beaman/Marshall residence for a few days prior to the incident. Marshall, Einarson, and Stiles are deaf; Beaman is hearing. Cassie was directly exposed to the mercury because the boys poured some on top of her head. Marshall and her son also had direct contact with the mercury.

Because mercury is a hazardous material, the City requested assistance from several other agencies. Specifically, at approximately 7:12 p.m., Sergeant Erickson called the Minnesota Duty Officer, the St. Paul Fire Department Chemical Assessment Team, the Minnesota Pollution Control Agency (MPCA), the United States Environmental Protection Agency (EPA), the National Response Center, the Minnesota Department of Health, and Regions Medical Center. The St. Paul Fire Department Chemical Assessment Team and MPCA representatives responded to the scene. At approximately 9:00 p.m., the City requested assistance from the Special Operations Team (SOT).

B. Dakota County Domestic Preparedness Committee and the SOT.

In September 2003, Dakota County and 11 municipalities located in Dakota County executed a joint powers agreement (JPA) pursuant to Minn. Stat. § 471.59 for the creation of the Dakota County Domestic Preparedness Committee. (Committee). The stated purpose of the JPA is to "provide joint exercise of the parties' powers to plan for and respond to the need of first responders for special response operations caused by the occurrence of large-scale disasters or emergencies." The primary duty of the

Committee is to establish and oversee a Special Operations Team (SOT).

The Committee established a SOT in accordance with the JPA. The SOT is a group of individuals who work in the areas of law enforcement, fire, or emergency management services and are employed by the parties to the JPA. SOT members are trained to conduct special rescue operations and are a resource tool for the parties to the JPA as well as non-member organizations. The SOT is not a first responder organization.

As part of its structure, the SOT has a team leader who is selected by SOT members. Mike Pott, fire captain with South Metro Fire[1] is the current SOT team leader and was the team leader at the time of the incident. At the time, there were approximately thirty-two (32) SOT members.

To seek the assistance of the SOT, the requesting community (host community) requests that the SOT be called out. By the terms of the JPA, whether the SOT shall provide such assistance and the extent of such assistance is determined solely by the SOT team leader – in this case, Mike Pott. Dakota County does not have the authority to direct the SOT to respond to an incident (i.e., mobilize). When it is determined that the SOT will respond, all SOT members receive a page advising them to report to a staging area within the host community. When the SOT arrives at the staging area, the team leader communicates with the host community's incident commander to learn more about the nature of the emergency and to determine what aid the host

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[1] The South Metro Fire Department is a joint powers organization comprised of the Cities of West St. Paul and South St. Paul that was established in 2008. Prior to that time, Pott was employed by the West St. Paul Fire Department.

community is seeking from the SOT. The SOT team leader places himself under the command of the host community incident commander.

C. SOT Responds to the Scene on September 6, 2004.

At approximately 9:00 p.m., the City requested the assistance of the SOT. The SOT responded to the mercury spill incident and arrived at the staging area at approximately 9:30 p.m. SOT team leader Pott and nineteen (19) other members of the SOT responded. Upon his arrival, Pott met with the Rosemount Fire Department incident commander and the team leader for the St. Paul Fire Department Chemical Assessment Team. The Rosemount Fire Department incident commander assigned the SOT the task of decontaminating individuals who were believed to have been exposed to the mercury. The SOT, with the assistance of the Inver Grove Heights Fire Department,[2] set up a decontamination line and decontaminated forty-nine (49) people. The individuals went through the decontamination as family units. The decontamination process started at approximately 11:11 p.m. and was completed at 2:00 a.m. on September 7th. At the time of this incident, there were no County employees that were on the SOT and no County employees participated in the decontamination process.

D. September 7, 2004.

In the early morning hours of September 7th, those individuals required to go through the decontamination process were subsequently

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[2] The Inver Grove Heights Fire Department provides assistance to the SOT in emergency situations requiring decontamination.

transported by bus to an emergency shelter. (i.e., the AmericInn located in Apple Valley, Minnesota). This included the Petitioners. Emergency shelter was necessary until it could be determined that homes were free from contamination. The American Red Cross was responsible for obtaining this initial emergency shelter. Twelve (12) homes, including the Beaman/Marshall and Loye/Gist homes were declared to be public health nuisances due to mercury contamination. Entry to the homes was restricted and inhabitation of the homes was prohibited pending cleanup under the direction of the MPCA.

September 7th is the first date on which Dakota County had any involvement in the mercury spill incident. This involvement came in the form of assistance to be provided by the Dakota County Department of Public Health (Public Health). Public Health was requested to take the lead in addressing public health issues and housing issues for the displaced households. On the evening of September 7th, the City of Rosemount hosted a meeting in the lobby of the AmericInn for the displaced households. Lieutenant Kuhns of the Rosemount Police Department spoke at the meeting and explained how the displaced residents could retrieve needed items from their respective homes. Kathy Wick, a Public Health supervisor, also spoke at the meeting. Earlier on September 7th, the American Red Cross made Public Health aware that some members of the displaced group were deaf and that some spoke Spanish. Accordingly, the necessary interpreters were obtained and were utilized for the meeting, including an American Sign Language (ASL) interpreter.

Immediately following the meeting, Wick spoke with Petitioners Loye and Gist using the same ASL

interpreter who provided services during the meeting. During this conversation, Gist expressed her unhappiness about the decontamination process. In response, Wick expressed her empathy and again explained some of the housing matters that were discussed during the larger meeting. Wick also spoke with Petitioner Marshall following the meeting and utilized the interpreter. The primary topic of this conversation was Marshall's daughter Cassie and the need for the child's hair to be retested and shampooed again.

E. **September 8, 2004.**

On the afternoon of September 8th, an internal meeting was held at Public Health which was attended by several Public Health employees, including Wick, several public health nurses, and Jon Springsted. Springsted is an environmental health specialist. One of the public health nurses in attendance was Gerilee Greeley. At this meeting, Wick advised the attendees about the mercury incident, that residents had been displaced, and that the American Red Cross was no longer going to shelter the residents. The public health nurses were each assigned several of the displaced households. The nurses were to follow up with the households on any public health needs related to the incident. In addition to other households, Greeley was assigned the Loye/Gist and Beaman/Marshall households. During this meeting, Greeley was advised that certain members of her caseload were deaf.

1. Meeting at AmericInn.

Following the internal Public Health meeting, Springsted and the assigned public health nurses went to the AmericInn to speak to the displaced

residents. The purpose in doing so was to communicate to them what was happening with their homes and to answer any public health related questions. Springsted made arrangements for an ASL interpreter to be present.

Springsted went to the AmericInn and spoke to several people. While there, he spoke to Petitioners as a group and used the interpreter in doing so. Springsted spoke to Petitioners for approximately thirty (30) minutes and discussed several topics including: (1) the contamination of the homes; (2) what was being done to decontaminate the homes; (3) the monitoring of the homes that would be conducted; and (4) that the homes would be cleared for reoccupation when it was believed that the levels of mercury were safe for people.

Greeley also went to the AmericInn the afternoon of September 8th. While there, Greeley met with Loye and Gist. An interpreter was utilized for this meeting. During this meeting, Gist expressed how upset she was with the decontamination process on September 6th. In addition, Loye advised Greeley that he was without his heart medication.

2. Community Meeting at Rosemount Community Center.

On the evening of September 8th, the City of Rosemount hosted a community meeting at the Rosemount Community Center. An ASL interpreter was retained and provided services for the meeting. Following the community meeting, there was a short meeting at the same location for the displaced residents. The same ASL interpreter was utilized for this small group meeting. Greeley was present at the Rosemount Community Center the evening of September 8th. Greeley met briefly with Loye to

deliver heart medication to him that she had obtained on his behalf. Greeley used an interpreter in communicating with Loye on this occasion because she needed to explain to Loye that he needed to see his doctor before the doctor would approve any future prescription renewals. Greeley also met with Marshall and Beaman. Greeley used an interpreter for this meeting. During this meeting, the conversation focused on Marshall's daughter Cassie and whether Cassie had undergone some necessary blood work. During this meeting, Greeley advised Beaman and Marshall that she would be picking up Cassie's urine collection jug[3] the following day at 10:00 a.m.

F. <u>September 9, 2004</u>.

On the morning of September 9th, a meeting was held at the AmericInn to discuss the relocation of the displaced households to Homestead Suites in Eagan, Minnesota. There was an ASL interpreter utilized for this meeting. Greeley was present for the meeting. While there, she met with Loye and Gist. Greeley used an interpreter for this individual meeting. Several topics were discussed during this individual meeting including the fact that the Loye/Gist household would be relocating to Homestead Suites that afternoon. In addition, while there, Greeley picked up Cassie's urine collection jug. Greeley received the jug from Beaman and had no contact with Marshall on this occasion.

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[3] Cassie's urine had to be collected for a 24-hour period for testing.

G. September 10, 2004.

On the morning of September 10th, a community meeting was held at the Eagan Community Center. An ASL interpreter was utilized for this meeting. Greeley attended this meeting and while there, she met with Loye and Gist and used the interpreter in doing so. Greeley also met with Marshall and used the interpreter in doing so.

H. September 11, 2004.

On the morning of September 11th, a meeting was held at Homestead Suites to discuss general mental health issues. An ASL interpreter was utilized for this meeting.

I. **Public Health Contacts with Marshall after September 10, 2004.**

The Beaman/Marshall home was cleared for re-occupancy on September 9, 2004, and the household members returned to the home on that date. Public Health had the following contacts with Marshall after September 10, 2004:

1. September 16, 2004. Greeley went to the Beaman/Marshall residence. The purpose of the visit was to drop off a community resource list and complimentary passes to the Minnesota Zoo and IMAX Theater. Both Beaman and Marshall were present. Greeley did not use an interpreter on this occasion.

2. September 17, 2004. The United States EPA contracted with Tetra Tech., Inc. to perform all air sampling of the contaminated homes. On this date,

Springsted accompanied the contractor to the Beaman/Marshall residence to observe the contractor conduct additional sampling. Marshall was present in the residence during the testing, but Springsted does not recall speaking with her. No interpreter was present on this occasion.

3. September 27, 2004. Greeley went to the Beaman/Marshall residence to check in to see how they were doing. Greeley did not use an interpreter on this occasion. When Greeley arrived, she had contact with Marshall. Marshall was crying and communicated to Greeley that she was upset because Beaman was moving out of the home. Greeley provided Marshall with the TTY number for the Dakota County Crisis Response Unit and encouraged her to call if she continued to be upset. During this visit, Greeley also informed Marshall that her daughter's blood and urine levels for mercury were normal.

Greeley's visit to the Beaman/Marshall residence on September 27th was the last contact Public Health had with Marshall. On those occasions when Public Health communicated with Marshall without the use of an interpreter, at no time did Marshall indicate that she could not understand what was being communicated to her nor did Marshall ever request that an interpreter be utilized.

J. Public Health Contacts with Loye/Gist after September 10, 2004.

Public Health had the following contacts with Loye and Gist after September 10, 2004:

1. September 13, 2004. Greeley went to Homestead Suites to check on the displaced households she had been assigned. While there she checked in with Loye and Gist. At this point, Loye and Gist no longer had any public health needs and were only at the hotel waiting for their home to be cleared for re-occupancy. Greeley did not use an interpreter on this occasion because she was simply checking in with people rather than conveying any important information. Greeley communicated with Loye and Gist using notes. During this meeting, it was agreed that Greeley could communicate with Loye and Gist via email.

2. September 14, 2004. Greeley went to Homestead Suites to check on the displaced households she had been assigned. While there she checked in with Loye and Gist. No interpreter was used on this occasion.

   A meeting had been scheduled for the MPCA to meet with Loye and Gist on this date. The MPCA requested that Springsted arrange for an interpreter to be present. Springsted passed this request on to Greeley. Greeley was unable to obtain an interpreter for

September 14th, so the meeting with the MPCA was rescheduled to September 15th. Greeley arranged for an interpreter for the September 15th MPCA meeting and notified Loye and Gist by email of the new date and time for the meeting.

While at Homestead Suites on September 14th, Greeley reminded Loye that he needed to make an appointment with his doctor before Loye could receive any additional heart medication. Greeley agreed to make the appointment for Loye. Greeley made the appointment and emailed Loye with the appointment date and time. Loye emailed Greeley acknowledging receipt of Greeley's email. Greeley confirmed in her progress notes that the clinic would provide an interpreter for Loye's appointment.

3. September 15, 2004. Greeley went to Homestead Suites to check on the displaced households she had been assigned. While there she checked in with Loye and Gist and reminded them of their meeting with the MPCA that day. Loye and Gist told Greeley they planned on attending the meeting. No interpreter was used on this occasion. Greeley communicated with Loye and Gist by writing notes.

Later that same day, Greeley returned to Homestead Suites. While there she delivered to Loye and Gist a

check in the amount of $150.00 from the Rosemount Lions Activity Fund. No interpreter was used on this occasion.

4. September 16, 2004. Greeley went to Homestead Suites to check on the displaced households she had been assigned. While there she checked in with Loye and Gist and reminded Loye of his doctor's appointment scheduled for that day. Loye indicated that he was going. No interpreter was present on this occasion. Greeley communicated with Loye and Gist by writing notes

In the early evening hours, Greeley returned to Homestead Suites and provided Loye and Gist with written instructions for *Carpet Replacement Procedure.* Greeley agreed to make an appointment for Loye and Gist at Abbey Decorating to select new carpet for their home. Loye told Greeley that he would prefer an appointment date of September 20th after 11:30 a.m. No interpreter was used on this occasion. Greeley communicated with Loye and Gist by writing notes.

5. September 17, 2004. Greeley made an appointment for Loye and Gist at Abbey Decorating for September 20th. Greeley emailed Loye and Gist with the appointment date and time.

6. September 20, 2004. Greeley emailed Loye and Gist reminding them of their appointment at Abbey Decorating on

that date. Loye responded to the email indicating that they would be attending the appointment. Later that same day, Greeley emailed Loye and Gist that their home had been cleared on that date for re-occupancy and that they could move back in after new carpet had been installed. Loye responded to this email on that same date.

7. September 21, 2004. Greeley emailed Loye and Gist that they should plan on checking out of Homestead Suites by 11:00 a.m. on September 23rd and returning home. In this email, Greeley also advised Loye and Gist that she would be stopping by Homestead Suites the following morning (i.e., September 22nd) at approximately 9:00 a.m. to provide them with some written instructions.

8. September 22, 2004. Greeley went to Homestead Suites to check on the displaced households still remaining. While there she met with Loye and Gist to provide them with *Instructions for Re-Occupation of Home* as mentioned in her September 21st email. No interpreter was present on this occasion. Greeley communicated with Loye and Gist by using written notes. Loye and Gist returned to their home on September 23rd.

9. September 27, 2004. Greeley received an email from Loye indicating that their

television was not working. Greeley responded to the email and again provided Loye with contact information to request financial assistance. Later that day, Greeley went to the Loye/Gist home to check in to see how they were doing. No interpreter was used on this occasion. Greeley communicated with Loye and Gist by using written notes. In addition, Loye voiced with Greeley. During this visit, Gist expressed her pleasure with the new carpet; they advised Greeley that the television was not working; and Loye had questions about what damage would be covered by his insurance. Greeley agreed to schedule a meeting on their behalf with the Rosemount Community Action Council. Loye and Gist expressed a preferred meeting date of September 29th in the morning.

10. September 28, 2004. Following her visit with Loye and Gist on September 27th, Greeley contacted the Rosemount Community Action Council several times and was finally able to schedule a meeting for Loye and Gist on September 29th. Greeley emailed Loye and Gist advising them of the date and time of the meeting.

The September 28th email from Greeley to Loye and Gist was the last contact Public Health had with Loye and Gist. On those occasions when Greeley communicated with Loye and Gist

without the use of an interpreter, at no time did Loye and Gist indicate that they could not understand what Greeley was communicating nor did Loye and Gist ever request that an interpreter be utilized.

K. Public Health Contact with Stiles.

Public Health had minimal contact with Stiles. Stiles was identified as being a guest at the Beaman/Marshall household, but was not identified as needing any public health services. Greeley did not have any communication with Stiles except to send him a release of information request so that Stiles could receive money from the Rosemount Lions Activity Fund. The only contact Springsted had with Stiles was the afternoon of September 8th when Springsted went to the AmericInn to meet with the displaced households. On that occasion, Springsted met with the Petitioners as a group and used an ASL interpreter. According to Marshall, Stiles had no contact with the mercury and returned to his own residence in Shakopee on September 9, 2004.

II. Procedural History

Approximately one year after the incident, each Petitioner filed a charge with the Minnesota Department of Human Rights (MDHR) naming Public Health as the Respondent. Each Petitioner alleged that Public Health violated the Minnesota Human Rights Act (MHRA) by engaging in an act of discrimination by not providing them with ASL interpreters during the evacuation and decontamination process, during the period when Petitioners were relocated to a hotel, during follow-up home visits and during some of the public meetings

concerning the contamination. The MDHR Commissioner dismissed the Petitioners' charges of discrimination.

Petitioners also filed the same charges with the MDHR against the City of Rosemount, the American Red Cross, and the Minnesota Pollution Control Agency. The MDHR found probable cause on the charges filed against these entities.

On January 19, 2007, Petitioners filed suit against the Respondent in the United States District Court of Minnesota alleging that the Respondent violated Title II of the Americans with Disabilities Act, 42 U.S.C. § 12132, Section 504 of the Federal Rehabilitation Act, 29 U.S.C. § 794, and the Minnesota Human Rights Act, Minn. Stat. § 363A.12. Petitioners filed an Amended Complaint on January 23, 2007, alleging the same violations. On February 3, 2009, the Respondent filed a motion for summary judgment and a motion for sanctions against Petitioner Stiles. By an order dated August 25, 2009, the Honorable James M. Rosenbaum granted the Respondent's motions. Petitioners appealed the district court's grant of summary judgment to the Eighth Circuit Court of Appeals. In an opinion filed on November 17, 2010, the Eighth Circuit affirmed the district court's grant of summary judgment.

On January 30, 2009, Petitioners served a state Complaint on the City of Rosemount, the American Red Cross, and the State of Minnesota alleging violations of the MHRA, which mirror those alleged by Petitioners in their lawsuit against the Respondent. The lawsuit is venued in Ramsey County, Minnesota.

ARGUMENT

THE COURT OF APPEALS APPLIED THE CORRECT LEGAL STANDARD.

Petitioners have presented no "compelling reasons" for their Petition for a Writ of Certiorari to be granted ("Petition"). *See* Sup. Ct. R. 10. Specifically, Petitioners fail to demonstrate that the Eighth Circuit's November 17, 2010, Opinion ("Opinion") is in conflict with a decision of this Court or another court of appeals or that the Eighth Circuit decided an important federal question that has not been settled by this Court. *See* Sup. Ct. R. 10(a)-(c).

In their lawsuit, Petitioners maintained that they did not receive effective communication during: (1) the decontamination process; (2) large group meetings; and (3) individual meetings with the public health nurse. As to the decontamination process, the Eighth Circuit held that the Petitioners failed to prove that the Respondent was responsible for interpreters not being present. (Pet. App. at A-7). Accordingly, for purposes of the Petition, only the large group and individual meetings are at issue.

As to the large group meetings, the Respondent clearly established that it provided ASL interpreters for each large group meeting. This fact was supported by Petitioners Loye and Gist who testified during their depositions that an ASL interpreter was present for each large group meeting. (Pet. App. at A-8). Nonetheless, in a desperate attempt to create a genuine issue of material fact, Petitioner Marshall argued that there was not an ASL interpreter provided for two large group

meetings.[4] As to the individual group meetings, Petitioners Marshall, Loye and Gist claimed that they did not receive effective communication and that as a result, did not receive the full benefit of the information that was being conveyed during the meetings.

On appeal, Petitioners argued that 28 C.F.R. § 35.160 required the Respondent to use an ASL interpreter each time it communicated with the Petitioners, without exception. (Pet. App. at A-9). The Eighth Circuit disagreed finding that Title II of the ADA did not demand compliance with Petitioners' literal reading of the regulation. (*Id.*). The court held that the legal standard is "effective communication that results in meaningful access to government services." (Pet. App. at A- 9 to A-13). The court's holding is in accord with Title II of the ADA , the regulations implementing it and applicable case law.

The ADA requires that qualified individuals receive "meaningful access" to programs and activities. *Randolph v. Rogers, 170 F.3d 850, 858 (8th Cir. 1999)* (citations omitted). The Department of Justice regulations implementing Title II of the ADA provide that public entities must "take

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[4] The only evidence offered on this point was the affidavit testimony of Marshall. According to Marshall, there was no interpreter provided for a large group meeting that allegedly occurred on the morning of September 8th and a large group meeting that allegedly occurred on September 15th. The evidence presented below established that there were no large group meeting on the morning of September 8th and there was no large group meeting on September 15th. The large group meeting that was held on September 8th was conducted in the evening. There was a meeting on September 15th, however, it was an individual meeting between the Minnesota Pollution Control Agency and Petitioners Loye and Gist.

appropriate steps to ensure that communications with . . . members of the public with disabilities are as effective as communications with others." *Bircoll v. Miami-Dade County, 480 F.3d 1072, 1082 (11th Cir. 2007) quoting 28 C.F.R. § 35.160(a).* Such steps may include furnishing appropriate auxiliary aids and services, which for deaf persons includes:

> Qualified interpreters, notetakers, transcription services, written materials, telephone handset amplifiers, assistive listening devices, assistive listening systems, telephones compatible with hearing aids, closed caption decoders, open and closed captioning, telecommunications devises for deaf persons (TDD's), videotext displays, or other effective methods of making aurally delivered materials available to individuals with hearing impairments.

28 C.F.R. § 35.104(1) (2011). The regulations also provide that a public entity must give primary consideration to the request of the individual with disabilities when determining what type of auxiliary aid and service is necessary. *Bircoll, 480 F.3d at 1082, citing 28 C.F.R. § 35.160(b)(2).* However, when giving primary consideration to the individual's request, a public entity is not required to provide exactly what is requested if it can demonstrate that another effective means of communication exists. *28 C.F.R. Pt. 35, Appendix A, comments to 35 C.F.R. § 35.160.*

In determining what constitutes an appropriate auxiliary aid or service, consideration

must be given to the context. *Id.* As noted by the *Bircoll* Court:

> In many circumstances, oral communication plus gestures and visual aids or note writing will achieve effective communication. In other circumstances, an interpreter will be needed. There is no bright-line rule, and the inquiry is highly fact-specific.

Bircoll, 480 F.3d at 1087. Factors to be considered in determining whether an interpreter is required include: (1) the context in which the communication is taking place; (2) the number of people involved; and (3) the importance of the communication. *28 C.F.R. Pt. 35, Appendix A, comments to 28 C.F.R. § 35.160.*

Petitioners contend that the Eighth Circuit held that the ADA does not require compliance with the "effective communication" standard set forth in 28 C.F.R. § 35.160 and that by its refusal to give deference to the regulations, the Eighth Circuit has created a division in the court of appeals on whether the regulations should be given deference. Petitioners have misstated the Eighth Circuit's holding. Contrary to Petitioners' argument, in issuing its Opinion, the Eighth Circuit clearly recognized the "effective communication" standard and also took into consideration the comments to the regulations as well as applicable case law. Rather than ignore the regulations as argued by Petitioner, the Eighth Circuit simply disagreed with Petitioners' interpretation of the regulations.

The Eighth Circuit Opinion does not conflict with a decision of this Court or any court of appeals nor does it implicate a federal question that has not

been decided by this Court. Accordingly, Petitioners have not carried their burden of demonstrating any compelling reasons for the Petition to be granted.

CONCLUSION

For the foregoing reasons, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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